TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 168

MISSOURI PACIFIC RAILROAD COMPANY, PETITIONER,

vs.

ROY STROUD

ON WRIT OF CERTIORARI TO THE SPRINGFIELD COURT OF APPEALS OF THE STATE OF MISSOURI

PETITION FOR CERTIORARI FILED SEPTEMBER 13, 1934.

CERTIORARI AND RETURN FILED NOVEMBER 6, 1934.

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[fol. 1] IN THE

SPRINGFIELD COURT OF APPEALS, OCTOBER TERM, 1922

ROY STROUD, Respondent,

vs.

MISSOURI PACIFIC RAILROAD COMPANY, Appellant

Appeal from the Circuit Court of Ripley County

Hon. Almon Ing, Judge

OPINION—Filed Jan. 29, 1923

James F. Green, of St. Louis, and J. C. Sheppard, of Poplar Bluff, for Appellant.
Cope & Tedrick, of Poplar Bluff, for Respondent.

Affirmed.

BRADLEY, J.: This is an action based on sections 9985 and 9990 R. S. 1919 to recover treble damages for alleged discrimination in furnishing cars to ship lumber. The cause was tried before the court and a jury, resulting in a verdict for plaintiff for $1,000, which was trebled in accordance with section 9990 and judgment rendered accordingly. Defendant filed motion for a new trial and in arrest. These were overruled, and it appealed.

This cause was here on a former appeal, 236 S. W. 891, and for a statement we refer to the cause as reported. The facts are substantially the same as appeared on the former appeal, except the question of an interstate shipment is not involved in the present appeal as it was in the former appeal. We will state such additional facts as may be necessary in disposing of the assignments of error.

Defendant contends that error was committed (1) in refusing its instruction in the nature of a demurrer; (2) in giving plaintiff's instruction number 1: (3) in the instruction on the measure of damages, and (4) that the verdict is excessive.

(1) The first assignment is based on the proposition that there [fol. 2] is no substantial evidence tending to show any unlawful or unreasonable discrimination. As stated, the evidence at the second trial was substantially the same as that of the first, and on the former appeal we ruled that there was sufficient evidence to take the cause to the jury, and we adhere to that ruling.

(2) Plaintiff's instruction number 1 is as follows: "The court instructs the jury that if you believe and find from the evidence in this case, that the plaintiff, Roy Stroud, had, on the 12th day of June, 1920, a quantity of lumber placed at Oxly, Missouri, a station

on defendant's railroad; that said lumber was deposited at the place provided by defendant for receiving such shipments; and that plaintiff on said date made application to defendant's agent at the said station for cars in which to ship his lumber; and that he tendered said lumber for shipment under the terms and conditions imposed by defendant; and if you further find that after the said cars were ordered by plaintiff and his application for same was filed and before said cars were delivered other shippers at the said station of Oxly, Missouri, engaged in the business of shipping lumber over defendant's railroad, ordered cars from defendant's agent at the station aforesaid, and that the defendant delivered cars to these shippers in preference to plaintiff and that the cars delivered to these other shippers were not to be used for shipping mine props or other mine material that had a preference under the Interstate Commerce Commission's ruling, offered in evidence; and if you further find that such preference, if any, resulted in a loss to plaintiff, then your verdict must be for plaintiff for such sum as you believe from the evidence he has been damaged, not to exceed $1,000."

Defendant challenges instruction number 1 on the grounds (a) that it failed to require the jury to find before plaintiff could recover that cars delivered to other shippers in apparent discrimination against plaintiff were for intrastate shipments; (b) that in- [fol. 3] struction number 1 is in conflict with defendant's instruction number 4; (c) that instruction number 1 fails to require the jury to find that there was any undue or unreasonable preference. (a) Defendant contends that even though it discriminated against plaintiff in furnishing cars that it is not liable if those whom it favored used the cars, furnished in discrimination against plaintiff, for interstate shipments. As stated supra, plaintiff's cause is based on sections 9985 and 9990 of our 1919 Revised Statutes. Section 9993 R. S. 1919 provides that all provisions of section 9980 to 9994 shall be held to apply to any shipment made from any point within the state to any point within the state, whether the transportaion of the same shall be wholly within the state or partly within this state and adjoining state or states. Our statute is applicable except in interstate shipments. Defendant's learned counsel does not cite any authority sustaining his contention and we find none. If a railroad company could with impunity furnish an interstate shipper cars in discrimination against an intrastate shipper then it would take no stretch of the imagination to see how utterly helpless, and at what great disadvantage an intrastate shipper would be. (b) Defendant says that plaintiff's instruction number 1 is in conflict with its instruction number 4. Instruction 4 is as follows: "The court instructs the jury that if you believe and find from the evidence in this case that on June 12th, 1920, plaintiff placed with the agent of defendant at Oxly, Missouri, an order for two cars to be loaded with lumber to be shipped from Oxly, Missouri, to St. Louis, Missouri, and that afterwards, on the 22nd day of July, 1920, defendant furnished said cars to plaintiff at Oxly, and that plaintiff held said cars at Oxly for four days and failed to load same, and consented that said cars might be delivered to A. M. Rash

for loading, which was done, then your verdict should be for the defendant." Defendant contends that instruction number 1 per- [fol. 4] mitted the jury to find for plaintiff even though they believed that he was furnished cars on July 22, 1920, as they might have found there was discrimination prior to July 22nd. No date is mentioned in instruction 1 as the date July 22nd in instruction 4 is mentioned. By instruction 4 the jury was told plainly that if the cars were delivered, etc., on July 22nd then plaintiff could not recover. We do not think that the jury was misled or confused, hence rule this point against defendant. (c) Next defendant challenges instruction number 1 because it fails to require a finding that the discrimination was undue or unreasonable. The statute, Sec. 9985 R. S. 1919, uses the words "undue" or "unreasonable," but if defendant discriminated against plaintiff as his evidence tended to show then such discrimination was as a matter of law undue and unreasonable, and under the facts here, it was not necessary to submit that issue.

(3) Plaintiff's instruction on the measure of damages is as follows: "The court instructs the jury that if you find for the plaintiff you should, in assessing his damage, take into consideration the reasonable market value of plaintiff's lumber at the date the cars ordered by plaintiff, on the 12th day of June, 1920, should have been delivered by the defendant, allowing defendant a reasonable time in which to make said delivery, and the reasonable market value of the lumber at the time defendant did deliver the cars so ordered, and your verdict should be for the difference between these two amounts not to exceed $1,000." We think that this instruction is proper and is not subject to the criticism leveled against it.

(4) Is the verdict excessive? Defendant by a process of elimination undertakes to demonstrate that plaintiff could not have lost over $400. We think that defendant's counsel is in error in his analysis of the evidence. It is not necessary to set out the evidence in ruling on this assignment. The trial court heard the evidence and told [fol. 5] the jury in effect that if they believed plaintiff's evidence they might find for him in a sum not exceeding $1,000. We think this is plain when the evidence is analyzed correctly.

The judgment below should be affirmed and it is so ordered. Cox, P. J. and Farrington, J. concur.

John H. Bradley, Judge.

[fol. 6] IN SPRINGFIELD COURT OF APPEALS

[Title omitted]

MOTION FOR REHEARING—Filed Feb. 7, 1923

Comes now the appellant within ten days from the rendition of the opinion of this court in the above entitled cause, and moves the

court to grant it a rehearing herein, and as grounds therefor states the following:

I

Because the opinion and decision of this court is in conflict with Article 1, Section 8, Paragraph 3 of the Constitution of the United States of America and a violation of the Fourteenth Amendment of said Constitution, is in conflict with the policy and decisions of the federal courts as announced in C. R. I. & P. Ry. Co. v. Hardwick Elevator Co. 226 U. S. 426 and other similar decisions, and is in conflict with the policy of the federal law as construed by the decisions of the Supreme Court of Missouri in Sells v. Ry. Co., 266 Mo., 184, and other similar decisions, in the manner and for the reasons hereinafter more particularly stated, to wit:

That Section 3 of the Act to Regulate Commerce, (24 Stat. L. 380), provides "that it shall be unlawful for any common carrier subject to the provisions of this act (1) to make or give any undue or unreasonable preference or advantage to any particular person, * * * or (2) to subject any particular person * * * to any undue or unreasonable prejudice or disadvantage in any respect whatsoever": that by the terms of the foregoing statute, Congress [fol. 7] has assumed jurisdiction over all discrimination in favor of as well as against interstate shipments, and has made it just as much a violation of the federal statute to discriminate in favor of an interstate shipper as it is to discriminate against him; that plaintiff's instruction No. 1 is not confined to discrimination in favor of other intrastate shippers, but permitted the jury to find for plaintiff if it believed that there was a discrimination in favor of either an intrastate or an interstate shipper to the prejudice of this intrastate shipper, and that the opinion of this court authorizes and sanctions recovery of treble damages in this suit based upon Sections 9985 and 9990, Revised Statutes of Missouri, 1919, where there is a discrimination in the furnishing of equipment in favor of an interstate shipper to the prejudice of an intrastate shipper, notwithstanding the fact that congress, through the aforesaid statute, has assumed jurisdiction over any and all discriminations in favor of interstate shippers.

Appellant's position is that it was necessary that the jury be required to find that the cars, if any, furnished other shippers in preference to him, were not used in interstate commerce. This court says that appellant has cited no authorities so holding. In this the court is in error. Appellant cited the following authorities:

Steele v. Railroad, 165 Mo. App. 311

Chicago, R. I. & P. Ry. Co., v. Farmers Elevator Co., 226 U. S. 426, 33 Sup. Ct. Rep., 174

Southern Railway Company v. Reid, 222 U. S. 244, 32 Sup. Ct. Rep., 140

Erie Railroad Company v. Popple of the State of New York, 233 U. S., 671, 34 Sup. Ct. Rep., 756,

People v. Commission, 135 N. E. 197.

11

This court has overlooked or failed to grasp the significance of the testimony as to the loss sustained by respondent as shown by his own evidence. There is no testimony whatever in this record warranting a verdict for respondent for more than $400.00.

Suggestions in Support of Motion for Rehearing

As stated in the opinion respondent's cause of action is based upon Sections 9985 and 9990 of the Revised Statutes of Missouri, 1919. That part of Section 9993 of the Revised Statutes of Missouri, 1919, referred to in the opinion, which provides that Section 9980 to 9994 shall be held to apply to any shipment made from any point within [fol. 8] the state to any point within the state, whether the transportation of the same shall be wholly within the state or partly within this state and adjoining state or states. This section, however, is void if it is construed to mean that even though in the transportation from a point in one state to a point in the same state, the goods move through another state for part of the journey, yet the movement is not interstate commerce. (Foster v. Western Union Telegraph Company, 205 Mo. App. 1, 219 S. W. 107.)

This opinion states, "Our statute is applicable except to an interstate shipment." If cars were furnished to shippers for shipments which were to move out of the state of Missouri, then those cars were furnished for interstate commerce, and the Missouri statute is not applicable, as conceded by the opinion in this case. This court has evidently overlooked the authorities cited on this point in appellant's original brief at page 76, and also some of the same authorities quoted from in appellant's reply brief at pages 2, 3 and 4.

This court has failed to consider the United States statute referred to in appellant's brief when it says: "If the railroad company could with impunity furnish an interstate shipper cars in discrimination against an intrastate shipper, then it would take no stretch of the imagination to see how utterly helpless, and at what great disadvantage an intrastate shipper would be."

If this statement were correct, the conclusion would be, of course, inescapable; but the railroad company cannot with impunity furnish interstate shippers cars in discrimination against intrastate shippers. If it should do that, it would violate the federal statute, and the intrastate shipper would have a remedy under that statute, but not under the state statute sued on here. This fact seems to have been entirely overlooked by this court.

Either the state statute or the federal statute covers the discrimination in favor of the interstate shipper and against the intrastate shipper. The courts have held over and over that both statutes cannot occupy the same field at the same time; that when Congress acts it covers the entire field to the exclusion of the state authority. [fol. 9] If the railroad company furnished an interstate shipper cars in preference to an intrastate shipper, then it would be a violation of the United States statute and not the state statute, and the shipper's

remedy would be under the former and not the latter statute. Perhaps this point was not made so clear in the original brief herein as it should have been.

In other words, appellant says that before respondent was entitled to a recovery upon the cause of action pleaded herein, it was incumbent upon him to show that he was discriminated against in favor of other intrastate shippers, and not in favor of an interstate shipper; that before he could recover herein, the jury must be told that they must find that same fact; otherwise respondent's remedy was under the United States statute and not the Missouri statute.

For these reasons appellant respectfully insists that a rehearing should be granted herein.

III

As to the amount of loss, if any, sustained by respondent, we think this court has overlooked the facts as disclosed by his own testimony, or has drawn an incorrect conclusion therefrom.

Respondent grounds his right of recovery upon the fact that appellant discriminated against him in the furnishing of only two cars which were ordered on June 12, 1920. According to his own testimony, he shipped out one carload on August 19, 1920, and another carload on August 23, 1920. Therefore he did actually receive all the cars he ordered, but at a date later than he says he should have received them. On the former carload he received the contract price of the commodity shipped, that is, what was the price agreed upon before he ever ordered the car at all. Therefore, he could not possibly have lost anything on account of any discrimination against him in the furnishing of that car. He received every cent he would have received had he shipped it out on the day he ordered the cars.

On the carload shipped on August 23, 1920, he received $40.00 a thousand feet for the lumber. There is no showing whatever as to how many feet of lumber were loaded in the car. Therefore, the [fol. 10] the verdict is based upon speculation wholly; nevertheless, the evidence does show that the maximum amount of lumber which could have been loaded in that class of car was twenty thousand feet; the market price for the commodity on June 12, 1920, the day the cars were ordered was $60 a thousand feet; he received $40 a thousand feet. Therefore, conceding that he loaded the car to capacity, he could not possibly have lost more than $400 on that car. Therefore, we have this result; he ordered two cars in which to ship lumber; he received two cars; he lost $400 on one car; he lost nothing on the other car. This result is reached not by a process of elimination as stated in this court's opinion, but is the result of the simplest sort of mathematics, about which there can be no two opinions arrived at under the record in this case.

There is no pleading that he could have shipped all the lumber he had on the yard in two cars of they had been timely furnished; there is no proof of that fact. He ordered only two, and received them, and has been allowed to recover for a loss which occurred to

the remainder of his lumber; which would have occurred even though the two cars ordered by him had been delivered to him on the same day they were ordered.

In the interest of justice appellant asks that this motion for rehearing be sustained by this court.

Respectfully submitted, (Signed) Edw. J. White, J. F. Green, J. C. Sheppard, Attorneys for Appellant.

Service of a copy of the above motion for rehearing is hereby acknowledged this fifth day of February, A. D. 1923, and formal notice of the filing thereof is hereby waived.

(Signed) Robert I. Cope, Attorney for Respondent.

[File endorsement omitted.]

[fol. 11] IN SPRINGFIELD COURT OF APPEALS

[Title omitted]

ORDER ALLOWING MOTION FOR REHEARING AND SETTING CAUSE

Now at this day, the Court having fully considered the said Appellant's motion for a rehearing of this cause doth sustain the same. Case set down for hearing on the March docket.

[fol. 12] IN SPRINGFIELD COURT OF APPEALS

[Title omitted]

Affirmed on Condition

OPINION

BRADLEY, J.: This is an action based on Sec-ions 9985 and 9990 R. S. 1919 to recover treble damages for alleged undue or unreasonable preference in furnishing cars to ship lumber. The cause was tried before the court and a jury, resulting in a verdict for plaintiff for $1,000, which was trebled in accordance with section 9990 and judgment rendered accordingly. Defendant filed motions for a new trial and in arrest. These were overruled, and it appealed.

This cause was here on a former appeal, Stroud v. Mo. Pac. 210 Mo. Appl. 311, 236 S. W. 891, and for a statement we refer to the cause as reported as the facts are substantially the same. An assignment here, however, relating to interstate commerce was not specifically decided on the former appeal.

Defendant contends that error was committed (1) in refusing its instruction in the nature of a demurrer; (2) in giving plaintiff's

instruction number 1; (3) in the instruction on the measure of damages, and (4) that the verdict is excessive.

The first assignment is based on the proposition that there is no substantial evidence tending to show any undue or unreasonable preference. As stated, the evidence at the second trial was substantially the same as that of the first, and on the former appeal we [fol. 13] ruled that there was sufficient evidence to take the cause to the jury, and we adhere to that ruling.

Plaintiff's instruction number 1 is as follows: "The court instructs the jury that if you believe and find from the evidence in this case that the plaintiff, Roy Stroud, had, on the 12th day of June, 1920, a quantity of lumber placed at Oxly, Missouri, a station on defendant's railroad; that said lumber was deposited at the place provided by defendant for receiving such shipments; and that plaintiff on said date made application to defendant's agent at the said station for cars in which to ship his lumber; and that he tendered said lumber for shipment under the terms and conditions imposed by defendant; and if you further find that after the said cars were ordered by plaintiff and his application for same was filed and before said cars were delivered other shippers at the said station of Oxly, Missouri, engaged in the business of shipping lumber over defendant's railroad, ordered cars from defendant's agent at the station aforesaid, and that the defendant delivered cars to these shippers in preference to plaintiff and that the cars delivered to these other shippers were not to be used for shipping mine props or other mine material that had a preference under the Interstate Commerce Commission's ruling, offered in evidence; and if you further find that such preference, if any, resulted in a loss to plaintiff, then your verdict must be for plaintiff for such sum as you believe from the evidence he has been damaged, not to exceed $1,000."

Defendant challenges instruction number 1 on the grounds (a) that it failed to require the jury to find, before plaintiff could recover, that cars delivered to t-o other shippers in discrimination against plaintiff were for *intrastate* shipments; (b) that instruction number 1 is in conflict with defendant's instruction number 4; (c) that instruction 1 fails to require the jury to find that there was any undue or unreasonable preference.

Defendant contends in effect that even though it subjected plaintiff to undue or unreasonable prejudice or disadvantage in failing to furnish cars, that it is not liable, if those whom it favored used the cars, furnished in discrimination against plaintiff, for interstate ship- [fol. 14] ments; and that instruction number 1 should have required a finding on that question. We granted a rehearing in this cause, and when it was reargued, it was urged that a shipper had no redress under the state statute when discriminated against, if such discriminattion was in favor of an interstate shipper. This question was one of the grounds which caused us to *great* a rehearing. The question is: If an *interstate* shipper is favored over an *intrastate* shipper, has the *intrastate* shipper any remedy under the state statutes? On the authority of Alexander v. Railroad, 282 Mo. 236, 221

S. W. 712, we answer the question in the affirmative. In that case our Supreme Court *en banc* had under consideration the same sections of our statutes as are involved here. In the Alexander case plaintiff sued to recover treble damages and attorney's fee for refusing to set a car of coal on a switch adjacent to plaintiff's coal yard. The defendant contended that the petition did not state a cause of action in that it was not alleged that the car of coal was an *intrastate* shipment. It was held that such an allegation was not necessary; that such was a matter of defense. Defendant in the case at bar does not specifically plead that the alleged favored shipments were interstate, but we think the point is sufficiently made. The court in the Alexander case said: "Neither do we think that appellant's contention that 'before appellant can be held liable it must be shown that it gave undue or unreasonable preference' to some person other than respondent, is well taken. If appellant's construction of this statute were sustained, a common carrier could refuse to deliver shipment to one consignee, and yet if it gave no special preference to other consignees it could not be held to have violated the law. We do not understand the law to mean that a common carrier may, without just reason, ruin a man's business by refusing to serve him, and then escape liability therefor merely because the injured one cannot prove that the carrier has shown an undue preference toward another, Section 3184, supra, does, it is true, forbid a common carrier 'to give any undue or unreasonable preference or advantage to any particular person,' but with equal clearness it also forbids a common carrier 'to subject any particular person to any undue or unreason-[fol. 15] able prejudice or disadvantage.' Either act is an offense against the law. Both might be committed at the same time, and, conceivably in the same transaction, but the offenses are not necessarily *concomitant*, nor in any sense *interdependent. It is not necessary for the carrier to violate the law twice in order to be held liable once.*" (Italics ours.)

To give one shipper "undue or unreasonable preference or advantage" is bound to result in "undue or unreasonable prejudice or disadvantage" to some other shipper, because there could be no *advantage* if only *one* shipper were involved. Plaintiff not only charged that another shipper was favored over him, but he also charges in effect "undue or unreasonable prejudice or disadvantage." In fact it seems to us that a charge of "undue or unreasonable preference or advantage" is equivalent to a charge of "undue or unreasonable prejudice or disadvantage." The converse, however, would not always be true, because a carrier could refuse to serve a shipper, and the refusal would work a great hardship although no other shipper was favored. The Alexander Case holds that either act, "undue or unreasonable preference or advantage," or "undue or unreasonable prejudice or disadvantage," is an offense against the law. "It is not necessary for the carrier to violate the law twice in order to be held liable once," as said in the Alexander Case. As we read that case it was not especially necessary for plaintiff in the case at bar to show that other shippers were

favored, it was sufficient for him to show that he was subjected to "undue or unreasosable prejudice or disadvantage." In establishing the latter fact, however, plaintiff's evidence established the former. But his *burden* was not the establishment of the fact that some other shipper had been given "undue or unreasonable preference or advantage," but that he had been subjected to "undue or unreasonable prejudice or disadvantage." Instruction number 1 is framed with the idea of *preference* to other shippers, but the establishment of that fact also established in this case the fact that plaintiff was subjected to undue or unreasonable prejudice or disadvantage. It is our conclusion that the character of the shipment or shipments, whether intrastate or interstate, that were [fol. 16] favored over plaintiff, is not of consequence, and that if an *intrastate* shipper is subjected to "undue or unreasonable prejudice or disadvantage," from favoring an *interstate* shipper, that such *intrastate* shipper can recover under the state statute. It was not necessary, therefore, for plaintiff's instruction to require a finding that the shipments alleged to have been favored over plaintiff were *intrastate.*

Defendant says that plaintiff's instruction number 1 is in conflict with its instruction number 4. Instruction 4 is as follows: "The court instructs the jury that if you believe and find from the evidence in this case that on June 12th, 1920, plaintiff placed with the agent of defendant at Oxly, Missouri, an order for two cars to be loaded with lumber to be shipped from Oxly, Missouri, to St. Louis, Missouri, and that afterwards, on the 22nd day of July, 1920, defendant furnished said cars to plaintiff at Oxly, and that plaintiff hold said cars at Oxly for four days and failed to load same, and consented that said cars might be delivered to A. M. Rash for loading, which was done, then your verdict should be for the defendant." Defendant contends that instruction number 1 permitted the jury to find for plaintiff even though they believed that he was furnished cars on July 22, 1920, as they might have found there was discrimination prior to July 22nd. No date is mentioned in instruction 1 as the date July 22nd in instruction 4 is mentioned. By instruction 4 the jury was told plainly that if the cars were delivered, etc., on July 22nd then plaintiff could not recover. We do not think that the jury was misled or confused, hence the rule this point against defendant.

Defendant challenges instruction number 1 because it fails to require a finding that the discrimination was *undue or unreasonable,* but if defendant discriminated against plaintiff, as his evidence tended to show then such discrimination was as a matter of law undue and unreasonable, and under the facts here, it was not necessary to submit that issue. The instruction requires a finding of facts which if true shows that plaintiff was subjected to undue or unreasonable prejudice or disadvantage.

[fol. 17] Plaintiff's instruction on the measure of damages is as follows: "The court instructs the jury that if you find for the plaintiff, you should, in assessing his damage, take into consideration

the reasonable market value of plaintiff's lumber at the date the cars ordered by plaintiff, on the 12th day of June, 1920, should have been delivered by the defendant, allowing defendant a reasonable time in which to make said delivery, and the reasonable market value of the lumber at the time defendant did deliver the cars so ordered, and your verdict should be for the difference between these two amounts not to exceed $1,000." We think that this instruction is proper and is not subject to the criticism leveled against it.

Is the verdict excessive? Plaintiff alleged: "That on June 12, 1920, he had placed ready for shipment at Oxly, Missouri, a station on defendant's railroad 20,000 feet of hardwood lumber, which was at the time of the reasonable market value of $60 per M, and which he had contracted to sell at that price, provided same could be delivered within a reasonable time, and on that date made application for two cars of defendant's agent at the station of Oxly and requested that same be delivered to him at that station for the purpose of transporting his said lumber over defendant's railroad from Oxly, Missouri, to St. Louis, Missouri."

Plaintiff had contracted to sell this lumber to one Arnold at $60 per thousand. Arnold had advanced $600 on the lumber, and because thereof accepted a car loaded on August 23rd. The number of feet in this car was estimated at from 10,000 to 11,625. This left, according to plaintiff's petition, not over 10,000 feet. The evidence showed that the market value on June 12th was $60 per thousand, and that there was practically no market in August when plaintiff was furnished cars.

Confining plaintiff to his petition he sustained no loss except on the 10,000 feet left after Arnold's car was accepted. Plaintiff disposed of the remaining 10,000 feet at an average of $9.75 per thousand. Hence on the 10,000 feet remaining he sustained a loss equal to the difference between $9.75 per thousand and $60 per thousand, which loss on the 10,000 feet amounted to $502.50. This [fol. 18] conclusion is inevitable if plaintiff is to be bound by his petition, and that he is so bound is the rule. Davis v. Bond 75 Mo. App. 32; Leavel v. Johnston, 209 Mo. App. 197, 232 S. W. 1064. We have averaged the price for which plaintiff disposed of his lumber locally, because there is no satisfactory evidence that there was any *market*, as that term is generally understood, when plaintiff was furnished cars in August. As stated plaintiff *alleged* that he had 20,000 feet of lumber and shipment on June 12th when he ordered two cars. He testified that he had on that date between 31,000 and 32,000 feet. It is on this *evidence*, and on the *assumption* that the 31,000 or 32,000 feet could have been shipped in *two* cars that plaintiff attempts to sustain his verdict for $1,000; but plaintiff ignores his petition in arriving at the result.

Based on the petition plaintiff's verdict could not exceed $502.50. The verdict of $1,000 returned by the jury was trebled, and plaintiff had judgment for $3,000. Plaintiff's judgment under his petition cannot exceed $1,507.50. If plaintiff will within 10 days from the date of filing this opinion file here a remittitur of $1,492.50,

the judgment for $1,507.50 will be affirmed, otherwise the cause will be reversed and remanded. Cox, P. J., and Farrington, J., concur.

John H. Bradley, Judge.

[fol. 19] IN SPRINGFIELD COURT OF APPEALS

[Title omitted]

JUDGMENT ON REMITTITUR

Now at this day it appearing to the Court that plaintiff in above cause has filed his remittitur in the sum of $1,492.50 with the Clerk of this Court, it is ordered that the judgment rendered in the Circuit Court of Ripley County in the above entitled cause be and the same is hereby affirmed in the sum of $1,507.50 and stand in full force and effect. And the costs of this appeal are taxed against Respondent.

[fol. 20] IN SPRINGFIELD COURT OF APPEALS

[Title omitted]

MOTION FOR A REHEARING AND ARGUMENT IN SUPPORT THEREOF—Filed July 6, 1923

Comes now the appellant in the above entitled cause, within ten days from the rendition of the opinion of this court in this cause; and files its motion for a rehearing herein, and as grounds for said motion states:

That this court has overlooked the following cases cited by appellant in its brief:

I

Steele v. Railroad, 165 Mo. App., 311;
C. R. I. & P. R. R. Co. vs. Farmers Elevator Co., 226 U. S., 426, 33 Sup. Ct. Rep., 174.
Southern Railway Company v. Reid, 222 U. S., 424, 32 Sup. Ct. Rep., 140.
Erie R. R. Co. v. People of the State of New York, 233 U. S., 671, 34 Sup. Ct. Rep., 756.
People v. Commission, 135 N. E., 197.

II

That this court's opinion in refusing to hold that the statutes of Missouri became inoperative on the question of discrimination in favor of interstate shippers after the enactment of a statute on the [fol. 21] subject by Congress, is in conflict with the following cases:

Savage v. Jones, 225 U. S., 501, 32 Sup. Ct. Rep., 715.
Southern R. Co. v. Reid, 222 U. S., 424, 32 Sup. Ct. Rep., 140.
Northern Pac. R. Co. v. Washington ex rel. Atkinson, 222 U. S., 370, 32 Sup. Ct. Rep., 160.
T. & P. R. R. Co. — Abilene Cotton Oil Co., 204 U. S., 426, 27 Sup. Ct. Rep., 350.

III

The case of Alexander v. C. M. & St. P. Ry. Co., 282 Mo., 236, 221 S. W., 712, cited by this court in its opinion, and upon which the holding in said opinion is based, is not in point for the reason that there was no question of interstate commerce in the case whatever.

IV

On the question of conflict between respondent's instruction number 1 and appellant's instruction number 4, this court has overlooked the case of Murdock v. Dunham, 204 S. W., 915 and cases there cited, which hold that the instructions are conflicting and constitute reversible error.

Suggestions in Support of Motion for Rehearing

Regarding the quotation from the Alexander case upon which this opinion is based, appellant respectfully suggests that the court's reasoning in that quotation is as equally applicable to the interstate commerce statute enacted by Congress as it is to the Missouri statute relied on herein for recovery. It may be true, as argued by this court, that the carrier is forbidden to subject any particular person to any undue or unreasonable prejudice or disadvantage, and by so doing violates the Missouri statute. If the same act results in giving undue or unreasonable preference to an interstate shipper, the common carrier has violated the act of Congress. Such being the case, has the shipper who has been prejudiced thereby, a remedy under the Missouri statute or the act of Congress, or both?

[fol. 22] A holding that the shipper may recover under both statutes would be as intolerable as holding that "a common carrier may, without just reason, ruin a man's business by refusing to serve him, and then escape liability therefor merely because the injured one cannot prove that the carrier has shown an undue preference toward another."

The question at issue here is whether or not the remedy furnished by the act of Congress is exclusive. Appellant maintains that under the authorities cited supra and cites also in its original and supplementary brief that Congress has entered this field, and that being true the remedy furnished by Congress is exclusive, and respondent cannot maintain an action under the Missouri statute.

Wherefore, appellant respectfully prays that a rehearing be granted herein.

Respectfully submitted, Edw. J. White, James F. Green, and J. C. Sheppard, Attorneys for Appellant.

Service of a copy of the above motion for rehearing is hereby acknowledged this fifth day of July, A. D., 1923, and formal notice of the filing thereof waived.

—— ——, Attorneys for Respondent.

[File endorsement omitted.]

[fol. 23] IN SPRINGFIELD COURT OF APPEALS

[Title omitted]

ORDER OVERRULING MOTION FOR REHEARING

Now at this day, the Court having fully considered the said Appellant's motion for a rehearing of this cause, doth overrule the same.

[fol. 24] IN SPRINGFIELD COURT OF APPEALS

CLERK'S CERTIFICATE

I, Frances P. Daniel, Clerk of The Springfield Court of Appeals, do hereby certify that the foregoing is a true copy of the Abstract of the Record and Brief; opinion filed January 29, 1923; motion for rehearing filed in consequence thereof; order of the court sustaining that motion; final opinion filed June 26, 1923; record showing filing of remittitur; second motion for rehearing filed and the order of the court overruling same in the case of Roy Stroud, Respondent, v. Missouric Pacific Railroad, Appellant, #3245.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Springfield Court of Appeals. Done at office in Springfield, State Aforesaid, July 24, 1923.

Frances P. Daniel, Clerk. Helen F. Bartlett, Deputy. Seal of the Springfield Court of Appeals, Missouri.

[fol. 25] IN CIRCUIT COURT OF RIPLEY COUNTY

ROY STROUD, Respondent,

vs.

MISSOURI PACIFIC RAILROAD COMPANY, a Corporation, Appellant

Appeal from the Circuit Court of Ripley County, Missouri

Hon. Almon Ing, Judge

Appellant's Abstract of the Record, Statement, Brief and Argument

Abstract of the Record

The petition upon which the above case was tried was filed in the office of the Clerk of the Circuit Court within and for Ripley [fol. 26] County, Missouri, January 25, 1921, and is as follows (omitting caption and signatures):

PETITION—Filed Jan. 25, 1921

"Plaintiff states that defendant is and was at the time hereinafter mentioned, a corporation duly organized and existing under and by virtue of the laws of the State of Missouri, and as such is permitted to sue and liable to be sued in the courts of this State; that defendant is now and was at the time hereinafter mentioned a common carrier and engaged in the business of transporting persons and freight for hire, and the doing of which it owned and operated among others a line of railroad from Oxly to St. Louis, both in the State of Missouri.

"Plaintiff for his cause of action states that on the 12th day of June, 1920, and for several months prior thereto he was engaged in the lumber business at Oxly, Ripley County, Missouri; that on the 12th day of June, 1920, he had placed ready for shipment at Oxly, Missouri, a station on the defendant's railroad, 20,000 feet of hardwood lumber, was at that time of the reasonable market value of $60.00 per M, and which he had contracted to sell at that price, provided same could be delivered within a reasonable time, and on that date made application for two cars of defendant's agent at the station of Oxly and requested that same be delivered to him [fol. 27] at that station for the purpose of transporting his said lumber over defendant's railroad from Oxly, Missouri, to St. Louis, Missouri

"Plaintiff states that all of said lumber was placed at the usual place, provided by defendant for receiving same; that he tendered said lumber for transportation under the terms which that kind of freight was handled by defendant and offered to pay to defendant the regular and customary charges for the transportation thereof, but plaintiff says that defendant wholly disregarding its duty to

this plaintiff failed, neglected and refused to deliver for him within a reasonable time the cars so requested, and plaintiff further says that after this plaintiff had made application as aforesaid for the said cars and before same were delivered other shippers at the said station of Oxly made application to defendant for cars to be delivered at Oxly, Missouri, and a number of cars were delivered to these shippers at the same place and for the same purpose as that requested by this plaintiff.

"Plaintiff says that by Section 9985 of the Revised Statutes of Missouri of 1919, it is made unlawful for any common carrier to make or to give any undue or unreasonable preference or advantage to any particular person, or firm, corporation or locality in the transportation of goods, wares or merchandise of any character, or to subject any particular person, firm, corporation or locality, or any particular description of traffic, to any undue or unreasonable prejudice [fol. 28] or disadvantage with respect to such transportation, yet plaintiff says that notwithstanding that, defendant was prohibited by the said Statute from discriminating against this plaintiff, such discrimination was made by the defendant aforesaid and no cars were delivered to this plaintiff until the 19th day of August, 1920; that as a direct result of defendant's unlawful, undue and unreasonable preference and discrimination against this plaintiff and its failure to deliver its cars within a reasonable time, as was its duty to do, plaintiff was unable to deliver said lumber to the purchaser thereof; that between the said dates of June 12th, 1920, and August 19th, 1920, there was a material drop in the lumber market and a material decrease in the demand for same, and plaintiff says that, at the time defendant did deliver its cars to him, he was unable to sell his said lumber in the regular lumber market at any price.

"Plaintiff further says that between the said dates of June 12th, 1920, and August 19th, 1920, the said lumber was exposed to the weather and was damaged to such an extent that it is impossible to sell same; and that by reason of all of which he has been damaged in the sum of $1,000.00.

"Wherefore, plaintiff prays judgment against the defendant for the said sum of $1,000.00 and that upon ascertaining the amount of damages sustained by plaintiff the court will render judgment for three times the damage sustained as provided by Section A, 9990 of the Revised Statutes of Missouri of 1919, and for a reasonable [fol. 29] attorney's fee to be assessed as costs, together with the costs of this suit."

[File endorsement omitted.]

The amended answer to said petition was filed in open court on June 27, 1921, and is as follows, to-wit (omitting caption and signatures):

In Circuit Court of Ripley County

Amended Answer—Filed June 27, 1921

"Comes now the defendant and by leave of court files its amended answer in the above entitled cause and admits that it is a railroad corporation duly incorporated under the laws of the State of Missouri, as a common carrier of freight and passengers and operates a line of railroad from Oxly, Missouri, to St. Louis, Missouri, and other lines of railroad in Missouri and other States, and is engaged in interstate commerce.

"Further answering, defendant admits that plaintiff on the 12th day of June, 1920, had placed ready for shipment at Oxly, Missouri, a station on defendant's railroad, some lumber, but denies that the plaintiff had twenty thousand feet (20,000 ft.) or anything like such amount, and denies that said lumber could have been sold for sixty dollars ($60.00) per thousand then or at any other time.

"Further answering, this defendant states that it denies that plaintiff tendered the said lumber or any portion thereof for transportation under the terms which that kind of freight was handled by defendant, and denies that plaintiff offered to pay defendant the customary charges for transportation of said lumber, and denies that the defendant failed, neglected or refused to deliver to plaintiff within a [fol. 30] reasonable time cars as requested by plaintiff for the purpose of shipping said lumber; but states that defendant did furnish cars to the plaintiff as ordered by him, June 12th, 1920, for the purpose of shipping said lumber and placed the cars ready for loading, and that plaintiff, after said cars were so placed to be loaded failed and refused to load same for a period of four days after said cars were so placed, and finally cancelled his order for said cars and voluntarily consented and permitted one A. M. Rash to load said cars and ship the same.

"Further answering, defendant states, that it denies that it delivered to other shippers at the said station of Oxly cars for shipment of lumber on orders by said other parties given after plaintiff had made his application for cars in preference to giving the cars to plaintiff; but states that all said cars, if any, delivered to other shippers, were either delivered on orders made prior to the order made by plaintiff, or in obedience to preferences made by the Interstate Commerce Commission.

"Further answering, this defendant states, that it denies that it, at any time, gave any undue or unreasonable preference or advantage to any one over that of the plaintiff, or to any particular person, company or firm in violation of Section 9985 of the Revised Statutes of the State of Missouri of 1919, or any other law at any time.

"Further answering, and for another and further defense to [fol. 31] plaintiff's cause of action, defendant states, that it moves its cars from Oxly, Missouri, to St. Louis, Missouri, over two routes: one over its line of railroad through the State of Missouri the entire distance from Oxly, Missouri, to St. Louis, Missouri; the other by way

of Thebes, crossing the Mississippi River at that point, and going over the Missouri Pacific Railroad through the State of Illinois into the City of St. Louis, and that the usual and regular way of routing cars loaded with lumber at Oxly, Missouri, and consigned to the City of St. Louis would be over the latter route, through the State of Illinois, and would be interstate commerce, and the Statute, Section 9985 of the Revised Statutes of the State of Missouri of 1919, has no application to the facts set up in plaintiff's petition, and this court has no jurisdiction to entertain plaintiff's cause of action.

"Further answering, defendant states that it denies each and every allegation in plaintiff's petition contained, not herein specifically admitted or denied, and having fully answered, asks to be discharged with its costs."

This cause was tried on March 27, A. D. 1922, in the Circuit Court of Ripley County, Missouri, the same being one of the days of the regular March Term, 1922, of said court, before a jury; and a verdict was rendered by said jury in favor of respondent and against appellant, in the sum of one thousand dollars; upon which verdict a judgment was duly entered in favor of respondent and against [fol. 32] appellant for the sum of three thousand dollars, a copy of which said judgment is now on file in this court.

And thereafter, on March 30, 1922, during the same term of court at which the cause was tried, the verdict rendered, and the judgment entered, and within four days from the rendition of said verdict, appellant filed its motion for a new trial herein, which said motion was by the court on said March 30, 1922, the same being one of the days of the regular March, 1922, term of said court, overruled by its order duly entered of record. And on said thirtieth day of March, 1922, defendant filed its motion in arrest of said judgment; which said motion was on the same day overruled by said court by its order duly entered of record. And thereafter, and upon the same day, appellant filed its affidavit for an appeal of said cause to this court, which said application was by the court granted, an appeal duly allowed, the docket fee of $10 paid to the Clerk of said court, and appellant was granted time within which to file its Bill of Exceptions, and time within which to file its appeal bond, all by an order of said court duly entered of record.

And thereafter, on September 8, 1922, within the time allowed by the court and by law for filing said Bill of Exceptions, appellant did so file the same duly signed, sealed, allowed and made a part of the record in this cause, by Hon. Almon Ing, Judge of the Thirty-third Judicial Circuit of the State of Missouri, and ex-officio Judge [fol. 33] of the Circuit Court of Ripley County, Missouri, and the Judge before whom said cause was tried, by an order duly entered of record.

Said Bill of Exceptions is in words and figures as follows (omitting the caption and signatures):

IN CIRCUIT COURT OF RIPLEY COUNTY

Bill of Exceptions

TESTIMONY OF ROY STROUD

Direct examination by Mr. Tedrick:

My name is Roy Stroud; I reside about eleven miles east of Doniphan, Missouri, in Ripley County. In June, July and August of 1920, I was running a saw mill, making car material and inch and two inch lumber, about nine miles northeast of Doniphan, in Ripley County, Missouri, and about eight miles of Oxly, which was my shipping point.

On June 12, 1920, I made application in writing for two cars at Oxly. I did not care what kind of cars. At that time I had between thirty-one and thirty-two thousand feet of lumber located at Oxly. It was No. 2 common and better, inch and two inches thick, by wide, all lengths, from eight to sixteen feet long. The first car I got after I made the application was on August 19. I did not load out any cars between June 12 and August 19, 1920, because I couldn't get the cars, although I tried to.

[fol. 34] Q. How often did you make application, or go to see about them?

A. Well, sometimes every day, sometimes not so often, maybe a week, or maybe it would be two or three days, just about whenever I would be there. The agent said he couldn't furnish me the cars, he had to let Rash have them. I didn't get the cars.

The reasonable market value of my lumber on June 12, along about that date was sixty dollars, I think it was worth. That is what I was selling it for at that time, on the local market. The first I knew of the order being cancelled or the market being off, it was along in August, somewhere between the middle and last of August. At the time the cars were delivered, I couldn't sell the lumber. I had no market for the lumber at that time.

I know C. H. Dicus at Poplar Bluff. In June, July and August, 1920, he was working for the railroad company. I also know A. M. and W. E. Rash, who were engaged in the timber business at Oxly along about that time, shipping lumber, car material, ties, mine props, mine caps. They sold their lumber to L. G. Black, at Naylor, Missouri. They sold him one car of inch lumber to my knowledge, and two cars of car material.

I was not at Oxly all the time, but the Rashes were loading every day I was. I don't know just what they loaded. Rash got cars after I had made my application and before my cars were delivered. He got a number of cars; I couldn't tell you how many. His mill [fol. 35] was located west of the railroad station, on the south side of the track, loaded his lumber from the trucks that were run from the mill to the cars, and also from the stacks of lumber. I have

known cars to stand on the siding waiting for him to load from the trucks for as high as four days. At that time I had my lumber stacked there ready for shipment, and couldn't get any cars to ship in.

Oxly is located on the Missouri Pacific Railroad, a branch of that railroad, the terminals of which are Neelyville and Doniphan, at the former place it connects with the main line, running north to St. Louis. That road is within the State of Missouri. A car of lumber loaded at Oxly for St. Louis, Missouri, could get there without leaving the State of Missouri via the Missouri Pacific Railroad System. I designated St. Louis as the point of destination of my shipment: Oxly to St. Louis, both points in the State of Missouri.

I had a conversation with the station agent every time I was down there. At different times he said "Your cars are next". When the cars came, Rash got some, A. L. Powers got some, and Leach got some. He said he had a telegram from Dicus saying, "Let Rash have cars in preference to all others".

By Judge Sheppard: We object to that, the contents of a telegram not the best evidence.

By the Court: Objection overruled.

[fol. 36] To which ruling of the court, the defendant, by counsel, did then and there duly object and except at the time.

A. The agent said if I would put out a little more money I might have got more cars.

Cross-examination by Judge Sheppard:

Q. When he told you that if you would put out more money you might get more cars, he and you were discussing the fact that you had tried to get loaders and wouldn't pay their price, wasn't that what he was talking about?

A. He had a reason for it.

Q. Isn't that what you were talking about? Isn't that what he meant, don't you know that is so?

A. No, sir; I don't.

Q. That is true, isn't it?

A. No, sir; it is not true. I ordered two cars to ship this lumber on June 12. My lumber was piled on the north side of the railroad, west of the station house, probably four telegraph poles away. Mr. Rash's loading place was right across the track, about 50 yards west of mine, on both the north and south sides of the track. The switch is on the south side of the main track. I loaded my cars across the main line, as did Mr. Rash when he loaded from that side. My cars were not placed there until August 19, and then [fol. 37] there was one car placed there for me. I loaded that one with car material, and sold it to a local buyer, L. B. Black, who had it engaged. He said nothing about the price having gone down. I don't know what the market price was, I was selling to a local buyer.

The railroad company did not place two cars for me to load on or about July 22.

Q. And didn't they set there for three or four days, up until about the 26th, and in the meantime you talked with Mr. Rash, after you couldn't get any loaders, wouldn't pay the price that the loaders wanted, and you told him, you agreed with him, in the presence of Mr. Powers, for Mr. Rash to have the cars, these two cars, and he went ahead and loaded them out, now isn't that true?

A. No, sir; not on that date. Mr. Rash loaded out cars after my order was placed on June 12. He shipped ties, lumber, mine props—that's all I know of directly. At that time I lived eight miles north of Oxly, and I stayed home at night and spent the day in Oxly part of the time. I reckon I was down there nearly every day, anyway four or five days out of the week. I could have shipped two cars in the month of July if I had the cars. I was in Oxly three or four times a week to see about shipping two cars a month. When there I stayed around town, along the railroad. I didn't stay up there and watch Rash loading lumber. I didn't say I knew how many cars he loaded. He loaded one car of inch lumber sometime in July, [fol. 38] somewhere between the tenth and fifteenth. I don't know whether I was down there on July 22 or not. I have no recollection of it. I don't know of any other day I was there. I couldn't give you the dates of all the days I was there. Between the twelfth of June and the nineteenth of August Rash loaded two cars of car material, and I don't know how many cars of ties; sometime in July, I couldn't tell you whether that was before or after I placed my order for these cars. I know that he ordered cars way after I did, and got them before I did. He ordered cars every day. He had been shipping right along, way before that. Of my own knowledge, I don't know that Rash ordered cars after I ordered these and got them before I got my cars; I am going by your record, what it shows.

I had between thirty-one and thirty-two thousand feet of lumber there for shipment; and between nine and ten thousand feet were shipped out. I sold some of the other lumber I had there, about a thousand feet of it for $20 a thousand. I sold probably two thousand feet for $12.50 a thousand. I sold about seven thousand feet of it for $10 a thousand. That made about twenty thousand feet I had disposed of. Then I sold about six thousand feet of it for $8 a thousand. The remaining four thousand feet I hauled out home and used it on the farm. There was no market for it, only just selling little batches around to the farmers. It was worth $8 a thousand.

[fol. 39] Redirect examination by Mr. Tedrick:

This book which is shown me is a book that the station agent has in his possession at Oxly, Missouri, in which he keeps the record of the application for cars, and kept in June, 1920. I remember signing my name in that. I examined it on an average of once a week, anyway, through the month of July. The first time I examined it was the latter part of June, and the last time about the last of August or the first of September. When I examined it the

last time if that notation there in that last line, was there like it is now, with reference to the cars I had offered, I did not see it.

After I had shipped out the ten or eleven thousand feet, or whatever it was that I sold to Arnold, I had between twenty and twenty-two thousand feet left. That is the lumber that I sold according to schedule of prices that I just gave Judge Sheppard a moment ago. I was selling it to local buyers for the market; I am not positive of the market price.

Q. I am talking about the local market.

A. $60. I was selling it to Add Arnold.

I don't know anything about two cars being set in there for me on July 22. I never was notified of having any cars there. I was delayed one day loading a car on account of the crew, and I came to Doniphan and got a crew. That was in August, and on a Satur- [fol. 40] day. I got a crew and loaded the car on the following Monday. That is the only time I had any trouble getting a crew.

Recross-examination by Judge Sheppard:

This is not the same car I was telling you about a while ago. I got one car on the 23rd, and got more cars later on. The first car was on August 19, which I loaded out with heavy car material. That is the one I came to Doniphan and got a crew to load. I got another car on the twenty-third and loaded it with inch lumber, and shipped both cars. The car loaded on the 19th was car material, and was a large car. I couldn't tell you how much there was in it. I got $40 a thousand for it. Then I loaded another car on the 23rd, and sold it to Add Arnold for $60 a thousand.

Q. Both of those cars come out of this 32,000 feet?

A. No, sir. These two cars on the 19th and the 23rd are all I got during that summer. I might have got some in September, but those two are all I got between June 12 and August 23. Then after the bottom dropped out, there wasn't much doing in the lumber business and anybody could get cars then.

Redirect examination by Mr. Tedrick:

[fol. 41] When I said a while ago that I had approximately 31,000 feet, I did not include that in the car of car material that I shipped. I had reference to the inch and two inch stuff. The car shipped on the 23rd and sold to Add Arnold came out of the 31,000 feet. It had been sold to him prior to the date it was loaded. He bought it along about the first of June, and paid me $600 for it. That is the reason he took it; he had advanced me $600 on this lumber. Rash was shipping all kinds of timber. Not all of the stuff he shipped were mine props and mine materials.

By Mr. Tedrick: I next introduce in evidence this record here, just identified by the plaintiff, this book—I want you gentlemen to notice these two columns, right here——

Which said exhibit is as follows:

[fol. 42]

EXHIBIT TO TESTIMONY OF ROY STROUD

Oxly, Mo., Station, 1920

No. of requisition	Date and hour order was filed	Name of shipper ordering	No. of cars ordered, each kind	Destination and routing of proposed loading	Date wanted	Number and kind furnished	Date nished fur- 1920	No. and loaded date and billed	Remarks
24	6-12-10 A	L. M. Stroud	Coal Box 2 Stock	St. Louis	At once	2 Coal	8-19-20	‡	Lbr.
25	6-15- 1 P	Leach L. Co.	C. B. 2 or Stk.	Chicago, Ill.	At once	2 Coal	7-22-20		Ties.
26	6-15- 1 P	Leach L. Co.	1 Do.	K. C. Mo.		1 Coal	7-22-20		Ties.
27	6-16- 1 P	A. L. Powers	2 Do.	St. Louis		1 Coal	7-22		
28	6-28-10 A	Park Bros.	1 Car			1 Box	8-3rd		Ties.
29	7- 6- 1 P	L. R. Stroud	1 Car			½ Bx.	7-15		Chair Posts.
30	7-12- 1 P	A. L. Powers	Coal Stk. 5 or Bx.	St. Louis	7-13	1 Flat	8-19	x	Lbr.
31	7-12- 1 P	Leach	2 Do.			4 Stk	8- 7		Ties.
32	7-12- 1 P	Leach	1 Do.	St. Louis	7-13	1 Coal	8-15		
33	7-12- 1 P	Leach	1 Do.	K. C. Mo.	7-13	2 Stk	8- 7		
				C. G. W. Ry. K. C. Mo.		1 Coal	8-14		
34	7-13-12 Noon	A. M. Rash	5 Do.	St. L. & Bond	7-13	1 Coal	8-14		
35	7-14-10 A	Sawner	5 Do.	St. L. Air Line Jct.	7-14	1 Coal	8- 3		
						1 Box	7-28	‡	Ties & Lbr.
36	7-17- 1 P	A. M. Rash	10 Do.	St. Louis & Bond	7-14	3 Coals	7-22		
						1 Box	8-14-20		
						1 Coal 2 Box	8-24-20		Ties.
						1 Coal	8-28		
						2 Coal 2 Stk	8-3rd		
						3 Coal	8-12		Ties & Lbr.
						2 Coal	8-14		
						1 Coal	8-24		
						1 Coal	8-24-20		

EXHIBIT TO TESTIMONY OF ROY STROUD—*Continued*

No. of requisition	Date and hour order was filed	Name of shipper ordering	No. of cars ordered, each kind	Destination and routing of proposed loading	Date wanted	Number and kind furnished	Date furnished 1920	No. and date loaded and billed	Remarks
37	7-22-10 A	W. E. Rash	4 Do.	System Points		2 Coal	8-26-20		Lbr., Ties, Props.
						1 Box	8-27-20		
		Leach L. & T Co.	2 Do.	St. Louis & Bond		2 Stk	8-19		Ties.
38	7-24- 8 A			Do.		2 Coal	8-28		Ties & Lbr.
39	7-29- 8 A	A. M. Rash	2 Do.			1 Stk	8-19		
						1 Flat	8-24		
		Leach L. & T.				1 Box	9-13		Ties
40	8- 9- 4 P	Co.	4 Do.	Do.		1 Coal	8-24		
						2 Coal	9- 9		Props.
41	8-11- 1 P	A. M. Rash	2 Do.	Do.		2 Coal	8-28		
						3 Coal	9- 4		Ties.
42	8-11- 2 P	A. L. Powers	5 Do.	Do.		3 Coal	9-13-20		Ties, P. & Lbr.
43	8-18- 2 P	Rash	3 Do.	Do.		3 Boxes	9-28-20		
44	8-19-10 A	Stroud	3 Do.	Do.				See from Order.	Lbr., Props & Ties.
45	8-25- 1 P	W. E. Rash	3 Do.	Sys. & Beyond	8-26	3 Coals	9-29-20		
						4 Coals	9-30		Ties.
46	8-27-10 A	Sawner	5 Do.	St. Louis		1 Coal	10- 2		
						1 Coal	9-27-20		
47	9-11-8:15 A. M.	A. M. Rash	6	St. L. & Zigler		1 Box	9-28-20	2 Coals 10-5-20	Props & Ties.
						2 Coals	9-30-20		
		Leach L. & T. Co.	4	St. L. & Bey		2 Coals	9-27-20		
48	9-11-10 A					2 Coals	9-30-20		Ties.

‡First placed July 22nd (July 26 given to Rash acct. Stroud could not get crew). 2 Coal Cars—Aug. 19-1920 later placed 2 coals

Testimony of Add L. Arnold

Direct examination by Mr. Tedrick:

My name is Add L. Arnold; I reside in Naylor, Ripley County, Missouri. In June, July and August, 1920, I was engaged in the lumber business at Naylor, and was buying at different places over the country.

I know the plaintiff, and bought lumber from him along about [fol. 43] those dates, at Oxly. I know what I was to pay him for the lumber, that was about the general market price. Number two common and better, the kind I was taking from him, was around $60 a thousand, F. O. B. cars. The lumber he had stacked there was number two common and better. I don't know the amount of feet he had stacked there from June 12 up until the middle of July; I had bought two cars, provided it was loaded before July 15th, for $60 a thousand. He did not get it loaded by that time. So, I cancelled the order that I had placed with him. I loaded one car after that, however. I had advanced him on the lumber, and took that car in order to get my money back. I made no estimate of what remained after I got that car, I couldn't say how much he had left. I saw it and would think there was in the neighborhood of 20,000 feet.

There was really no market for that class of lumber on August 19, 1920. You could not sell very much of that at a time at the local markets, at Oxly, Naylor, or other places around here. If you could sell any this inch lumber, number two common and better, was around $20 or $25, something like that at that time, but there was hardly any market for it.

Cross-examination by Judge Sheppard:

I took one car from plaintiff, which was loaded on August 23; I [fol. 44] did not buy the car material, only different widths and lengths boards. I suppose he had the same kind of lumber left there that I had bought. We loaded the one car out of the stack that was there.

Redirect examination by Mr. Tedrick:

I don't remember just exactly the number of feet in the car we loaded out, but we paid him something around $600 altogether. The number of feet of lumber you can load in a car depends on the size of the car; it would run from ten to sixteen thousand feet, in a real big car you can load 20,000 feet. You could load 31,000 feet in two cars if they were big enough.

Recross-examination by Judge Sheppard:

I testified in this case once before.

Q. I find from your testimony in that case you say this car contained 11,652 feet; I noticed from your testimony that you say this car contained 11,652 feet, was that right?

A. Well, I had the invoice at that time—it was something near that; I couldn't find the invoice this time, and I didn't bring it with me this time. Whatever I said at that time was correct.

[fol. 45] TESTIMONY OF GEORGE PURDOM

Direct examination by Mr. Tedrick:

My name is George Purdom; residence, Naylor, Missouri. I am now farming. I know the plaintiff and have loaded car material for him, which he had sold to Black Lumber Company. I was the inspector for Black. That car was loaded in August, about the 23rd or something like that. I believe it was loaded on Monday or Tuesday, something like that. We went over there to load, and there was some dispute about the crew, and we came up here to get a crew; and we went down Monday and loaded out—that was on Saturday, that we came up here to get a crew.

Cross-examination by Judge Sheppard:

I testified in this case at the other trial.

Q. Was this question asked you and did you make this answer:

"Q. Did you hear Mr. Stroud testify about you loading cars—I'll ask you, did you load a car for him along in June?

"A. Well, I couldn't say,—it was somewhere last June or July; about the last of June or the first of July, a car of car material."

A. I loaded several cars for Mr. Stroud. I loaded cars from June [fol. 46] until August, with car material, the last one about August 23. I had loaded cars with car material for him before that, some in June and July. I couldn't say how many cars I loaded either in June or July. I suppose I loaded a car the last of June or the first of July, and another on August 23. I couldn't say how many I loaded, it wasn't my business to do that; I never kept any account, Black kept the record.

Redirect examination by Mr. Tedrick:

I took up car material for Rash, about July, something like that, I couldn't say what months. The car material from Rash was sent to East St. Louis, care of the C. & A.

Plaintiff rests.

DEFENDANT'S REQUESTED INSTRUCTIONS TO JURY

The defendant here offered and requested the court to give to the jury a peremptory instruction in the nature of a demurrer to the testimony of plaintiff; a copy of said peremptory instruction being in figures and words as follows (omitting the caption):

"Now at the close of the evidence offered on behalf of the plaintiff, the court instructs the jury that under the law and the evidence your verdict in this case must be for the defendant."

Which said peremptory instruction, so offered and requested to [fol. 47] be given by the defendant, the court failed and refused to give to the jury; and to the action of the court in so failing and refusing to give said peremptory instruction to the jury the defendant, by counsel, did then and there duly object and except at the time.

Defendant's Evidence

Testimony of A. M. Rash

By Judge Sheppard: I'll first read the testimony of A. M. Rash, as preserved in the Bill of Exceptions of the former trial of this case, which is as follows:

Direct examination by Judge Sheppard:

My name is A. M. Rash. I live at Oxly, Missouri. I lived there last June, July and August of last year, and at that time, I was working for the Rash Timber Company, working for my brother. We were running a saw mill, getting out mine timber, mine props and mine ties, selling and shipping them, most of it from Oxly; that is where we shipped most of it from. On an average I do not hardly know how many cars we would ship in the course of a week, or month; the best week I ever run was 32 cars but we did not average that. Last summer, when business was good, we would average 60 cars a month. I know Mr. Stroud. He was shipping lumber from that same place at that time. I do not know anything [fol. 48] about the capacity of his business, about how many cars he shipped, I do not know anything about that. I remember two cars being placed at Oxly for Mr. Stroud to load sometime last summer. I do not know about the date, but he did not load them.

By Mr. Cope: We object to that unless the time is fixed.

By the Court: Tell when it was.

By Judge Sheppard: About when was it, Mr. Rash?

By Mr. Cope: He's already testified that he didn't know.

By Judge Sheppard:

Q. About when was it?

A. Well, I think——

By Mr. Cope: I object to what he thinks.

By Judge Sheppard: We have got the date here in writing.

By the Court: Give us your best judgment about it.

A. Well, I think it was in July.

By Judge Sheppard:

Q. If you had any conversation with Stroud about those cars, tell the jury what it was—what happened to the cars?

A. Well, I didn't have any conversation with him. I loaded the cars, he did not load them, and I did.

Q. Well, did you have any conversation with him in which he told you that he couldn't get hands and for you to go ahead and [fol. 49] load them out?

A. Well, my understanding was that——

By Mr. Cope (interrupting): We object to what he understood.

By the Court: Yes, objection sustained.

By Judge Sheppard:

Q. What did he tell you about loading the cars, if anything in that regard?

A. Well, he said he wouldn't pay the price for loading the stuff.

Q. Did he tell you anything about loading them out?

A. Well, he said I could load the cars.

Q. Did you load them out, or not?

A. I did.

Q. Who was present when he talked to you about that, if anyone?

A. Clell Powers, the agent.

By Judge Sheppard: That's all.

Cross-examination by Mr. Cope:

Q. Now, Mr. Rash, you stated a moment ago that you had no conversation at all with Mr. Stroud, is that true?

A. Yes, sir; I didn't have any conversation with him.

Q. Didn't have any conversation with him. Then didn't you just [fol. 50] answer another question of Judge Sheppard's that you did have a conversation with him?

A. Yes, sir; I did.

Q. You don't know what date it was?

A. No, sir; I told you I didn't know the date. They were coal cars. I shipped about an average of 60 cars a month, last summer when business was good. They were principally coal cars they were shipping. I shipped them to Zigler, Illinois, and West Frankfort, Illinois, principally. Some of the lumber, I do not know where they went to; it was sold to local buyers; and I do not know where it went, they shipped it. I never went over to see Mr. Dicus, I never met him in my life until the other day.

Q. Your brother then, was that the one? You have a brother?

A. Yes, sir; my brother's name is W. E. Rash, has been a railroad man. I was not able to ship our stuff out as fast as we could get it out, could not get cars. It is not a fact that a number of times that cars were furnished me before I had a car load cut.

Q. And you would cut the lumber and take it to the car in a truck, just load it right off the truck into the car?

A. No, sir.

Q. They never did load them from the truck?

A. Oh, yes; they loaded from the truck; when they would be loading a car with certain kind of stuff, and the truck would come [fol. 51] up with a load of them on it, when they would just load it into the car off the truck, so they wouldn't have to handle it again.

Q. Do you remember the conversation that you had with Stroud?

A. He just wouldn't load the car.

Q. Do you remember the conversation which you had with Stroud in which he told you—in which you told him that if he wanted to get cars from the Missouri Pacific Railroad that he would have to pay for them, that was the way you were getting them?

A. No, sir; I didn't tell him that; I didn't buy any cars. I do not remember the occasion of getting a statement and showing it to the boys, where they had me charged with a turkey that was given one of the railroad boys. It might have been my brother that sent the turkey to the agent at Oxly, and to Mr. Dicus. I don't know anything about his business. My brother, the Rash Timber Company, might have given a number of the railroad employees turkeys during the year 1920, I don't know what he did. I was working for my brother. I made the application for the cars which the Rash Tie and Timber Company ordered, when I was there.

Q. How many did you apply for at the time?

A. Well, I have ordered as high as ten and fifteen. I had that much stuff there ready for shipment, all the time. I never got it all shipped; I threw away 42 bills of lading along about the first of the [fol. 52] year. During the summer months when we run 60 cars a month we did not keep very well cleaned up; nothing extra; the lumber on the yards there we could have saved if we had had the cars. I made application just as I thought I would need them—I watched that to see, that was probably once or twice a week. I did order ten or fifteen cars once or twice a week, and then did not get what cars I wanted. I got about 60 cars a month, that would be my guess. I remember 32 was the highest I ever loaded out in one week. I do not think I ever had any application there at one time for 32 cars; I suppose the railroad company accepted my application for as many as ten to fifteen cars at the time. I am not the Mr. Rash that went to see Mr. Dicus and told him that my checks were being turned down, and that I just had to have cars, regardless of costs. I do not know whether my brother ever saw Mr. Dicus or not, he lives in St. Louis. He came down here quite often last year, about once a month. This material that I was shipping, it was all going to the coal mines, pretty well all of it. I do not know where the lumber was going, we didn't handle the shipping of that; the local buyer attended to that. I sold some lumber to the Black Lumber Company of Corning. I believe that was shipped in coal cars, I would not be positive, I did not think to pay any particular attention to it at the time. I don't think I have ever shipped any material from Oxly to St. Louis. I did not give my brother this list of railroad men to send these turkeys to, [fol. 53] I do not know whether he knows them or not. I reckon he sent those turkeys just because he wanted to, that's all I know.

Q. Do you remember trading Mr. Stroud one coal car for two box cars?

By Judge Sheppard: If the court please, we object to that, we are charged here with discrimination, we couldn't help it if these two men traded cars.

By Mr. Cope: They are undertaking to get some testimony in here that they set some cars out for Stroud, and that Rash loaded them out.

By Judge Sheppard: That was two cars; no trading done there, just released them to Rash.

By the Court: Go ahead and find out about it.

By Mr. Cope:

Q. You say these two cars that you loaded, that was placed there for Stroud, that you just loaded them out?

A. Yes, sir.

Q. He didn't tell you to load them, did he?

A. Well, he just refused to load them—in other words, he released them.

Q. He never said anything at all to you about them, did he?

A. Why, he just released them.

Q. He never said anything to you at all, did he?

A. Me and Mr. Stroud talked to the agent, and Mr. Stroud said I could load them; that's all the conversation there was about them, [fol. 54] that I could go ahead and load them. I think it was in July, I am not certain about the date. I do not think it was in August, that late. I am not swearing it wasn't in August. I wouldn't tell this jury that it wasn't as late as the 24th of August, am pretty sure it was not that late.

A. M. Rash, of lawful age, having been first duly sworn, was recalled, and testified further in behalf of the defendant, as follows:

Direct examination by Judge Sheppard:

I know where Mr. Stroud's lumber pile is down there. I went up there about a month ago, and looked at the lumber that is left there. It scaled about 6,500 feet.

By Judge Sheppard: That's all.

Cross-examination by Mr. Cope:

It is inch lumber, oak, the lengths, I think, 8, 10 and 12 feet. Clell and I just measured it to see about how much there was in it. He asked me to go with him, and I did so. I do not know how much there was there on August 24, 1920. I had other business to see to besides that. I do not know how much there was there on June 12, 1920; I do not know anything about that. I know why I went up [fol. 55] there and measured it, because the agent asked me to go with

him. I did not scale any two inch lumber. I did not scale that because the agent did not ask me to scale that, just scaled what the agent wanted scaled. He told me why he was scaling it, he said there was going to be trouble over it, so he wanted to know how much there was of it.

By Mr. Cope:

Q. Did you know that you were going to be a witness then?
A. No, sir! I didn't.

I scaled that about a month ago, and there was a little better than 6,000 feet. I have not my scale with me, but as I remember it, it was something about 6,500 feet.

TESTIMONY OF CLELL POWERS

Direct examination by Judge Sheppard:

My name is C. A. Powers. I am railroad station agent at Oxly, Missouri, for the Missouri Pacific, and was in June, July, and August, 1920. I know the plaintiff who made an order for cars on June 12, and he made probably another one or two, I don't remember the date. That is the order which is shown on the book there, of June 12. He ordered two cars. That order was filled on July 22 but he did not load out the cars. He came to me and said he couldn't get a [fol. 56] crew, and that he would like to let Rash have the cars, if he could get the next cars that came in on Rash's order. If I am not mistaken Mr. Rash was right there then. I switched the cars on Rash's yard, and he loaded them out. They were billed out on the twenty-sixth. They were placed at plaintiff's lumber pile originally.

Mr. Rash and I measured plaintiff's lumber pile, and estimated that he had about 8,900 feet, that was probably two or three months afterwards—a month or so, anyhow. I can't say whether he had sold any at the time we made the estimate or not.

Cross-examination by Mr. Tedrick:

Mr. Rash did the measuring. I was there with him. I did not check up the measurements or scale. All I know about it is what Rash told me.

By Mr. Cope: Then if the court please, we ask that all his testimony in that respect be stricken out.

By Judge Sheppard: Did he put down the—did you put down the amounts that he gave you when he measured it?

A. Yes, sir.
Q. Made a memorandum of it?
A. Yes, sir.

By Mr. Tedrick: We don't care about that.

Q. When was that?

[fol. 57] By the Court: Well, if he is testifying to what somebody told, let it be stricken out; of course, if he knows of his own knowledge it is all right, but I understood him to say that he was testifying from what somebody told him, which wouldn't be competent.

By Judge Sheppard: All right.

A. I don't know how much lumber was there, any more than what Rash figured up. He shipped probably on an average of 20 or 25 cars of lumber a month. He did not testify that he shipped about 60 cars a month. If he said so, he was wrong. I don't know what was the highest number or lowest number he shipped per month. He never did handle 60 cars in a month, but I don't know just how many he was shipping a month. Those cars which were delivered to plaintiff were set in on July 22, I don't remember the day of the week.

I knew they were for him because he had an order in and was the next man out, and they were placed for him. These cars on July 22, were the first cars we had received after all earlier orders were filled; I don't mean they were the first cars received after his order was filled, but they were the first cars received after all earlier orders were filled.

From this record Stroud made his application at 10 o'clock A. M. June 12, 1920. This record shows his order was filled on August 19, 1920; but his order was first filled July 22, the record shows August 19. This line shows an order filed June 28, and filled July [fol. 58] 15, for Park Brothers. That was after plaintiff's application was filed, and the car delivered before July 22. I had some kind of authority for that, I don't remember now just what it was.

I am tolerably well acquainted with Rash. I got a turkey from him. Some of the train crew got turkeys from him; I don't remember whether they all did or not. I did not tell Stroud one time that the reason he didn't get cars was because he didn't put out the money, on the twenty-ninth day of June, 1921, in the presence of Pete Wise and Elbert Reece and Frank Tennyson.

Redirect examination by Judge Sheppard:

I said that if Roy had put up the money to get the car loaded, he would have got the car loaded, that is what I said, referring to the money for getting the crew for loading the car. Plaintiff's order for a car was filed on June 12; on July 22 we got eight coal cars, and there's a notation on the bottom here of this book which says, "First placed July 22nd; July 26th given to Rash account Stroud could not get crew, two coal cars. August 19, 1920, later, placed two coals. This memorandum up here check marked, that had reference to the second time that the cars came in there, but the other two were put in there on July 22.

The order made by Park Brothers on June 23, the book shows

[fol. 59] that that order was filled on July 15, and out here it says something about "chair parts". That lumber had laid there quite a while, and it was damaged, the weather was damaging it, or something, and we had orders to ship it out, is the reason that car was furnished them at that time.

Recross-examination by Mr. Tedrick:

That was the car that was ordered and received by Park Brothers after plaintiff had placed his order on June 12; it was ordered on June 28 and delivered seven days before July 22. It was not damaged much, but it was in good shape to damage a good deal. That particular stuff was subject to the weather more than any other shipper's lumber down there, and I got a car. Stroud asked me about cars, and I showed him my authority I got from Poplar Bluff to let Rash have cars. Those orders were signed G. B. S., meaning G. B. Scott, chief dispatcher. I don't remember now just how the orders read. One of them said "Place so many cars, two or three, for Rash, for mine props, preference all other orders." I don't believe one order said, "Let Rash have cars preference to anyone else," probably so, but I don't remember it.

Redirect examination by Judge Sheppard:

[fol. 60] The mine props went to the Illinois coal mines. There was a general order that they should go in preference to other things, they couldn't go anywhere except to the coal mines; they wouldn't let us route coal cars anywhere except to the mines.

Recross-examination by Mr. Tedrick:

I know C. H. Dicus. He might have sent some telegrams with reference to these cars, but they were not signed by him. At that time he was car dispatcher for the Missouri Pacific Railroad Company. I have heard he is not working for the company now; while he was, I took orders from him while he was so employed.

Testimony of E. C. Baird

Direct examination by Judge Sheppard:

My name is E. C. Baird; I am a railroad conductor on the Doniphan Branch of the Missouri Pacific Railroad Company, and was June, July and August, 1920. I know the plaintiff, also Mr. Rash. Stroud had a lumber yard at Oxly along about that time. The best I remember he had lumber on both sides of the track there between the depot and the stock pen, which is on the right hand side going [fol. 61] towards Neelyville. I know he had some on the same side of the track that the depot was on, but I wouldn't be positive about his having some on the other side of the track. I know there were

some cars placed in there for him along the latter part of June sometime—I mean July. Two coal cars were placed there along the latter part of July. I couldn't give you the exact date. They were afterwards turned over to the Rash Lumber Company, loaded out and shipped. The brakemen at that time were Crossen and Withan, the latter working extra.

Cross-examination by Mr. Tedrick:

I couldn't tell you how much lumber plaintiff had stacked down there. I think at that time he had lumber on the left-hand side going towards Neelyville; he may have had lumber on both sides, I couldn't say as to that. I knew no more about where his lumber was than just spotting the cars the latter part of July. At that time the car situation was very short, we didn't set out lots of cars at that time. I couldn't say what the average number of cars which were set out along about that time. We set out cars for Rash Lumber Company, Stroud and the Powers Tie and Timber Company. I don't remember that anyone else was loading out at that time. At that time Rash was loading all the cars he could get a month, I couldn't [fol. 62] say how many; I know he was shipping a good many mine props. He was not shipping as many as 20 a month at that time, because he couldn't get them; he might have if he could have got them, but I don't think he shipped that many because he couldn't get them. I don't think any of these shippers got that many cars a month.

I said we placed these two cars for Stroud and then changed them over to Rash upon the orders of the station agent; we placed cars according to his instructions, have nothing to do with that ourselves. I know Rash pretty well. He gave me and the entire train crew turkeys.

Redirect examination by Judge Sheppard:

We haven't a thing in the world to do with the placing of his cars; he had given me a turkey before that, before he ever went into business, a couple of times before that when he was at Naylor with a corn crusher. He was using cars at that time, too. The agent at Oxly gave us orders to place these cars for plaintiff in the first place, and changed them to Rash upon his orders; we have nothing to do with the placing of cars outside of the instructions we get from the agent.

TESTIMONY OF J. A. CROSSEN

Direct examination by Judge Sheppard:

[fol. 63] My name is J. A. Crossen; my home is at Fair Dealing. I have lived in this county 23 or 24 years. I was working on the Doniphan Branch as a brakeman in June, July and August, 1920,

and had been working on that train in that capacity around thirty years, something like that.

I know the plaintiff, and know he said he had some lumber at Oxly in those months. His lumber pile was a little the other side of the stock pen, between there and the depot, on the left side of the track, going east. We placed a couple of cars there for him, along about the 20th of July. After a few days, we had to place them for a man that was loading mine props, Rash. We moved them up this way from there. I don't know who loaded them, they were taken out.

Cross-examination by Mr. Tedrick:

They were coal cars. The cars were placed for plaintiff first, so they told me, about July 20, along towards the middle of the month or a little later. He had ordered them and then we had to move them away, upon the instructions of the agent who had told us to put them there in the first place. I don't know why plaintiff did not load them.

I don't know how many cars we usually set out a day during those months; some weeks we would set out more than others. I don't remember how many. Rash was doing a good deal of shipping [fol. 64] down there, and was getting more cars than anybody else, I think. I wouldn't say how many cars he used during a week or month. I know him. It was the young Rash who gave me the turkey, that is, he said he would give me one, but I never did get it. Said it was over to the chicken house. I did not go to Goodwin & Jean's and get mine; they said it was over there, but I never did get it. I did not testify in this case before; I didn't know about it. If the conductor did, I didn't know it; I never heard him say anything about it.

Redirect examination by Judge Sheppard:

The turkey that they told me about having left over there for me, did not have anything to do with placing these cars. It was the young fellow that gave me the turkey; the old gentleman was the one that was there when the cars were being placed. We placed cars under the conductor's instructions, he has the switch list, that shows where the cars are to be placed. We obey his orders, and he gets his instructions from the station agent.

Testimony of P. H. Withan

Direct examination by Judge Sheppard:

[fol. 65] My name is P. H. Withan; I am a brakeman on the Missouri Pacific. I was working extra at Hoxie in June, July and August, 1920. In July sometime I worked on the Doniphan Branch, something like nine days. I couldn't say when it was, the conductor kept my time, I suppose. I had my time down on a book myself,

but I misplaced it. I remember being in there west of the depot at Oxly close to the stock pens, more than one time, but I don't remember anything about spotting the cars. I don't know anything about this case.

TESTIMONY OF G. J. HIDINGER

Direct examination by Judge Sheppard:

My name is G. J. Hidinger; reside at Oxly, Missouri, and have a little over two years. I have been in that neighborhood nearly fourteen years. In June, July and August, 1920, I was running a feed store at Oxly. I know the plaintiff, and know about some lumber he had on the railroad to ship. I saw it a number of times. He had a lot of inch lumber, and then he had some kind of square timber, I don't know what you would call that lumber, some planks or boards, and then some two by fours. I never dealt in lumber any; I have worked at the carpenter trade a good deal. I know good lumber and I know bad lumber when I see it. This lumber which I [fol. 66] saw was red oak. There was some inch stuff, one by — wide, I believe a couple of stacks of that, and then there was this heavy stuff, car stock, ties, or some other heavy kind of timber. It was second grade lumber. When I examined it, there was somewhere in the neighborhood of ten thousand feet of it. I don't think he shipped any out after I saw it, but I don't know about that. I bought one stack of lumber myself, there was two stacks at the time I bought one. I bought between four and five thousand feet of it, I believe in August, I wouldn't say for sure. I paid a dollar a hundred, sometime in the fall. I don't recollect just when it was.

Cross-examination by Mr. Tedrick:

I saw them piling the lumber there, but I don't remember just when it was; I didn't pay any attention to the date. The best I remember I bought this lumber in August, 1921. I couldn't say how long it had been there when I bought it, because I didn't pay any attention to that.

I know what number two common is in dressed lumber. When I said this was second grade lumber, I didn't get that from the lumber market. In dressed lumber it is lumber with a few knots, a few faulty places in it. I do not know what that lumber was worth in June or July, 1920, on the market. I don't know how much he had [fol. 67] then or how much he sold. All I know is I bought one stack of lumber at ten dollars a thousand.

TESTIMONY OF R. R. POWERS

Direct examination by Judge Sheppard:

My name is R. R. Powers; live at Oxly, Missouri, and know the plaintiff, and did in 1920. I know he had quite a bit of lumber down there at Oxly; I had a conversation with him about loading some cars of timber, about getting hands. One day I was coming to town, and he came up with me on the same train, he said he was coming after a crew, said his crew at Oxly had struck on him. I don't remember the date, have no idea about it.

By Judge Sheppard: I now read in evidence the deposition of George W. Briece, taken in this case on the 20th and 21st days of June, 1921, in St. Louis, Missouri, at the Railway Exchange Building, Room 1109, before J. C. Hopewell, Notary Public, on the part of the defendant; I'll just offer that part of it with regard to the two lines of railroad. This deposition is found on pages 37 to 45, both inclusive, of the Bill of Exceptions now on file in this court, and is as follows:

TESTIMONY OF GEORGE W. BRIECE

Direct examination by Mr. J. C. Sheppard:

[fol. 68] My name is George W. Briece; my residence, St. Louis, Missouri, and I am Superintendent of Transportation of the Missouri Pacific Railroad Company. I occupied the same position during June, July and August, 1920. As such official of the Missouri Pacific, I have personal knowledge of the car situation, particularly with respect to so-called coal cars on the line of the Missouri Pacific during the months above mentioned.

Q. This suit is for alleged discrimination, it being claimed by plaintiff that he placed an order with the Missouri Pacific agent at Oxly, Missouri, on the 12th day of June, 1920, for two cars for the purpose of loading and shipping lumber to St. Louis, Missouri, and it is alleged by plaintiff that cars for lumber loading were furnished other shippers out of order, and in preference to his order, thereby discriminating against him. Will you please state fully all facts regarding the car situation during the time in question, particularly with respect to any orders from your office or elsewhere, that might affect the distribution of such equipment.

By Mr. Cope (interrupting reading of deposition): We object to the answer to that question, for the reason that the situation and condition of shortage of cars wouldn't license any discrimination between shipper of the same kind of material, as to coal cars, or any other cars; it wouldn't make any difference in this case, and wouldn't be any defense; and it is only offered here for the purpose of getting [fol. 69] something to the jury that is not competent; he asked con-

cerning the car situation at that time, as to whether or not there was any shortage wouldn't enter into this case, and wouldn't be any defense to it.

By Judge Sheppard: If the court please, in view of the testimony already given in this, we think it is competent to show the situation, and also the orders from the Interstate Commerce Commission who controlled the roads, with reference to the furnishing of cars, which would take precedence over anything else.

By the Court: Go ahead, objection overruled.

To which ruling of the court, the plaintiff, by counsel, did then and there duly object and except at the time.

By Mr. Cope: We object to it for the further reason that the Interstate Commerce Commission or any ruling of that commission wouldn't apply to this shipment.

By Mr. Tedrick: This is not any shipment at all, and for that reason don't come under the ruling of the Interstate Commerce Commission, we object to it on that ground.

By Mr. Cope: Your Honor, these are cars that were never delivered.

By the Court: Objection overruled.

To which ruling of the court, the plaintiff, by counsel, did then and there duly object and except at the time.

[fol. 70] By Judge Sheppard (reading from deposition): "As early as May, 1920, there was a very severe shortage of coal cars, which class of cars is usually used for lumber loading. It, therefore, became necessary for the carriers to make certain orders giving coal shipments priority, so far as the distribution of this class of equipment was concerned. Most of these orders originated from the Commission on Car Service of the American Railroad Association. The carriers, according to the rules of the Interstate Commerce Commission, have a right to make reasonable rules and regulations with respect to the distribution of equipment, and if the Commission deems it advisable to change these rules, or considers the emergency such that it is necessary for the Commission itself to provide such rules, it handles the matter by appropriate orders. Under date of May 28, 1920, we received wire from W. C. Kendall, Chairman of the Commission on Car Service of the American Railroad Association, which telegram is offered in evidence as "Exhibit A" and is as follows:

"Effective immediately the use of coal-carrying cars for the loading of automobiles and other commodities which can be transported in box cars and other types of equipment is prohibited. Continuous low rate of coal production makes this policy an absolute necessity."

On June 2, 1920, our office received a further communication from [fol. 71] Mr. Kendall which is attached to my deposition and made a part thereof, identified as "Exhibit B", and particular attention is called to the fourth paragraph reading as follows:

"Coal-carrying cars must not be used for the loading of automobiles and other commodities which can be transported in box cars and other types of equipment."

Upon receipt of these communications from Mr. Kendall, I immediately placed instructions with our various superintendents to the effect that coal cars must be confined to the loading of coal, with the exception that they could be used for loading mine props destined to the coal regions. By the middle of June, the condition became so bad that the Interstate Commerce Commission issued its service order No. 7, dated June 19, 1920, a copy of which was served upon me and is attached to this deposition and offered in evidence as "Exhibit C". Thereafter on June 28, 1920, we received from Mr. Kendall further instruction tending to carry out the foregoingg order of the Interstate Commerce Commission, which letter of Mr. Kendall is offered in evidence and identified as "Exhibit B".

On the strength of these orders, our agents were instructed not to permit coal cars to be used for loading other commodities, except such commodities as mine props and other such material destined to [fol. 72] the mines, notwithstanding shippers might have orders in for cars to be loaded with lumber and other commodities of like character. In other words, the cars could be used for loading other commodities than coal, only on the return movement to the mines.

Q. What was the general condition as to the car shortage on the Missouri Pacific during June, July and August, 1920?

A. From June 12 to June 30th, we were short 1410 box cars, 228 flat cars and 383 coal cars. From July 1st to July 31st, our average daily shortage was 1,296 box cars; 239 flat cars and 244 coal cars. From August 1st to August 19th, our average daily shortage was 1,661 box cars, 248 flat cars and 300 coal cars. (There not being time to complete the taking of the depositions in this cause on June 20th, the further taking of said depositions is continued until tomorrow at the same place and between the same hours).

Q. Please state how general routing instructions are issued by the railroad?

A. Routing instructions originate from my office and are incorporated in a printed circular.

Q. I will ask you to identify the document which I now hand you and have marked as "Exhibit E".

A. This is Routing Circular No. 42, issued by the Superintendent of Transportion of our line, November 5, 1911.

By Mr. Sheppard: "Exhibit" is offered in evidence and made a part of this deposition.

[fol. 73] Q. Will you identify this other document that I am handing you, which is marked "Exhibit F"?

A. Exhibit F is Routing Circular No. 26, issued by Superintendent of Transportation December 1, 1920, which cancels Circular No. 42, which has just been identified as "Exhibit F".

By Mr. Sheppard: Exhibit F is attached to and offered in evidence as a part of this deposition.

Q. The petition alleges that plaintiff ordered certain cars on the 12th day of June, 1920, to be loaded with lumber and shipped to St. Louis, Missouri, from Oxly, Missouri. Will you explain the routing that would, or should have been given this shipment, according to Circular No. 42 identified as "Exhibit E", which was in effect from November 5, 1911, to December 1, 1920.

A. Turning to page 12 of Exhibit "E", you will find Oxly, Missouri, is in Group 114, and turning to page 14 of the same exhibit you will find St. Louis, Missouri, is in Group 1. Now, turning to page 95 of the same exhibit you will find the station from which the shipment is made designated in the group column at the left, and the station or group, to which the shipment is made designated at the top of the respective columns. Oxly, Missouri, as I have stated, was in group 114, which is the fifth number from the top at the left of the page. Following this line over on the right to the column headed "Group 1" you will find the symbols "QS." This means that ship-
[fol. 74] ments between Group 114 and Group 1 take the routing symbol "QS". Turning now to page 140 of the same exhibit you will find the routing instruction "QS" explained as follows:

"Ivory Transfer, Illmo, Poplar Bluff."

This means, that according to the routing circular, shipments moving between Oxly, Missouri, and St. Louis, Missouri, are routed east of the Mississippi River by way of Thebes Bridge, and hauled back from Illinois to Missouri over the Ivory Transfer.

By Mr. Tedrick: We desire to object to that question, and move that the answer be stricken out, for the reason it is immaterial, it doesn't tend to prove or disprove any of the issues in this case.

By the Court: What was the question?

(Question is read by Judge Sheppard.)

By Mr. Cope: Your Honor, this is not a shipment, they just made application for cars for shipment.

By the Court: The question is asked what route it should have or would have taken?

By Judge Sheppard: Yes.

By Mr. Tedrick: We take the position that it don't make any difference, as it wasn't any shipment at all.

By the Court: Overruled.

To which ruling of the court, the plaintiff, by counsel, did then and there object and except at the time.

By Judge Sheppard (continuing to read deposition):

[fol. 75] Q. If cars were ordered as alleged in the petition, for shipment during June, July or August, 1920, from Oxly, Missouri, to St. Louis, Missouri, loaded with lumber, what would have been the routing instructions?

By Mr. Cope (interrupting): We desire to offer an objection to that question Your Honor, and ask that the answer be stricken from the record, and the jury instructed to disregard it, for the reason that such routing instructions weren't in effect at the time this shipment was made, but on the contrary there was an Interstate Commerce Ruling which forbid and prohibited the railroad companies from routing intrastate shipments outside the State, and which compelled them, forced them to ship in the State on the main line wherever it was possible to do so, and that was in effect at the time of the alleged shipment—application for these cars.

By the Court: You say there was an Interstate Cmmerce oommission ruling to compel them to ship wholly within the State where it was possible to do so?

By Mr. Cope: Yes, sir.

By the Court: Where is that?

By Mr. Cope: I understood that from the freight agent at Poplar Bluff, Missouri, Mr. Jeffords, that there was such a ruling; he told me that was the ruling and had been for quite a while.

By the Court: Is that all you know about it?

By Mr. Cope: And that this order had been cancelled, and that [fol. 76] where it was possible to do so, the shipments were to be made within the State.

By the Court: In the absence of any showing there was such a ruling by the Interstate Commerce Commission, compelling railroads to ship their freight wholly within the State, where it was possible to do so, the objection will be overruled.

By Judge Sheppard: I know it isn't so, as I have an opinion of the United States Supreme Court holding absolutely to the contrary.

By the Court: Objection overruled.

To which ruling of the court, the plaintiff, by counsel, did then and there duly object and except at the time.

By Judge Sheppard (again reading from deposition):

A. As I have stated, the routing instructions according to Circular 42 would have been over Thebes Bridge and up through Illinois, and then back across the River at Ivory Transfer.

Q. Will you please explain why this routing circular provides for movement over the line of the Missouri Pacific, which runs up the east side of the river through Illinois, rather than a routing over the line of the Missouri Pacific, which runs up the west side of the river and is entirely within the State of Missouri.

A. The routing through Illinois is a matter of operating convenience and economy. The line running up the Missouri side of the river passes over Iron Mountain and other Ozark hills, and it is [fol. 77] very expensive to handle tonnage over these hills. To avoid these hills the routing as given in the circular was over the much more level line, running up the Illinois side of the river.

Q. It is necessary for you to have back for permanent files the documents offered in evidence and identified as "Exhibits A, B, C and D," inclusive?

A. Yes, sir. It is necessary for me to have these documents back for my personal records.

(Signed) George W. Briece.

Subscribed and sworn to before me this 21st day of June, 1921. My commission expires October second, 1921. (Signed) J. C. Hopewell, Notary Public, City of St. Louis.

By Judge Sheppard: I'll next introduce in evidence the telegram, Exhibit A, attached to Mr. Briece's deposition, which is as follows:

EXHIBIT A TO TESTIMONY

"Washington, D. C., 4.45 a. m. May 28th, 1920.

"W. A. Robertson, V. P. Missouri Pacific R. R., St. Louis, Mo.:

"Effective immediately, the use of coal carrying cars for the loading of automobiles and other commodities which can be transported in box cars and other types of equipment is prohibited. Continuous low rate of coal production makes this policy an absolute necessity. Acknowledge.

"W. C. Kendall."

[fol. 78] EXHIBIT B TO TESTIMONY

By Judge Sheppard: Next desire to introduce in evidence the circular, No. CCS-33, which has been identified as Exhibit B, attached to Mr. Briece's deposition, which is as follows:

"To Railroads:

"The production of bituminous coal during April and May has been averaging two and one-half million ton per week less than what is necessary for the country's adequate fuel supply, and particularly to permit a sufficient movement up lake to the northwest and ocean and rail to New England to protect next winter's consumption in those sections. The average placement on bituminous coal loading roads has been approximately fifty per cent.

"In order that coal production may be increased, and discrepancies in placement as between commodities made up, it is necessary that—

"1. Railroads must distribute available coal cars for loading coal to a minimum of fifty per cent of actual requirement before distributing coal cars for loading other commodities.

"2. Railroads may distribute available coal cars for loading other commodities requiring open cars to an extent not exceeding fifty per cent of actual requirements based on ability to load and ship, and any surplus as available shall be applied to increase the supply for coal loading.

"3. Railroads having no coal loading will restrict the supply of coal cars for loading of other commodities requiring open cars to [fol. 79] an extent not exceeding fifty per cent of actual requirements based on ability to load and ship. Foreign cars used in this manner must be loaded strictly in accordance with car service rules, and must not be back hauled for loading.

"4. Coal carrying cars must not be used for the loading of automobiles and other commodities which can be transported in box cars and other types of equipment.

"W. C. Kendall, Chairman."

By Judge Sheppard: Next I'll offer in evidence Interstate Commerce Commission Order No. 7, which is as follows:

EXHIBIT C TO TESTIMONY

Service Order No. 7

AT A GENERAL SESSION OF THE INTERSTATE COMMERCE COMMISSION HELD AT ITS OFFICE, IN WASHINGTON, D. C., ON THE 19TH DAY OF JUNE, A. D. 1920.

It appearing in the opinion of the commission, that because of a shortage of equipment and congestion of traffic, aggravated by unfavorable labor conditions which continue to exist upon the lines of each and all the common carriers by railroads, subject to the Interstate Commerce Act, within the territory east of the Mississippi River, and because of the inability of said common carriers properly and completely to serve the public in the transportation of coal, an emergency exists which requires immediate action;

It is ordered that such common carriers by railroad in the afore- [fol. 80] said territory which serve coal mines, whether located upon the line of said railroad or customarily dependent upon it for car supply (herein termed coal-loading carriers) be, and they are hereby, authorized and directed for the period of 30 consecutive days, beginning with June 21, 1920, to furnish coal mines with open top cars suitable for the loading and transportation of coal (herein termed coal cars) in preference to any other use, supply, movement, distribution, exchange, interchange, or return of such coal cars; provided, that such coal cars may be used in service moving in the direction of the mine or mines to be supplied, on the return movement, after the discharge of the coal lading thereof, upon a route not materially out of line and to points not beyond such mine or mines.

It is further ordered, that all common carriers by railroad within said territory other than coal-loading carriers, (herein termed non-coal-loading carriers) be, and they are thereby, authorized and directed during said period to deliver daily to a connecting coal-loading carrier or carriers, empty or loaded coal cars up to the maximum ability of each such non-coal-loading carrier to make such

deliveries, and of each such connecting coal-loading carrier to receive and use the coal cars so delivered for the preferential purposes herein set forth.

It is further ordered, that all such common carriers by railroad within said territory be, and they are hereby, authorized and directed [fol. 81] forthwith, and during said period, to discontinue the use of coal cars for the transportation of commodities otherwise than as hereinbefore specified (a) as to each coal-loading carrier, so long as any coal mine remains to be served by it with coal cars, and (b) as to each non-coal-loading carrier, so long as deliveries of any coal cars to connecting carriers may be due or remain to be performed under the terms of this order.

It is further ordered, that all common carriers by railroad within the territory hereinbefore described be, and they are hereby, authorized and directed, effective June 23rd, 1920, and until the further order of the commission, to place an embargo against the receipt of coal by any consignee, and against the placement of coal cars for consignment by any consignee, who shall fail or refuse to unload coal placed for unloading within 24 hours after such placement, until all coal so placed has been unloaded by such consignee, provided, that this authorization and direction shall not interfere with the movement of coal under permit to any coal pool or pools when authorized by any order heretofore or hereafter entered by the commission.

It is further ordered, that all the rules, regulations and practices of said carriers with respect to car service are hereby suspended in so far only as conflicting with the directions hereby made; and that the authorizations and directions herein contained are to be considered as not conflicting with or superseding any Service Order [fol. 82] heretofore entered by the commission.

And it is further ordered, that copies of this order be served upon the carriers hereinbefore described, and that notice of this order be given to the general public by depositing a copy thereof in the office of the Secretary of the Commission at Washington, D. C.

By the Commission:

George B. McGinty, Secretary. (Seal.)

By Judge Sheppard: I next desire to introduce in evidence Order No. 49—Circular No. 49 of the Commission on Car Service of the American Railway Association, which is incorporated in this Bill of Exceptions in this cause now on file in this court, at pages 50 and 51, and which is as follows:

EXHIBIT D TO TESTIMONY

Circular CCS-49

To Railroads:

Service Order No. 7 of the Interstate Commerce Commission being designed to increase coal production by requiring preferential place-

ment of cars for coal loading, Commission on Car Service Circular CCS 33 is hereby cancelled.

All carriers, both those east and west of the Mississippi River, should note carefully the aim of Service Order No 7 to increase coal production in mining territory east of the Mississippi River.

Carriers west of the Mississippi River must note that the obligation of the roads east of the River with respect to the preferential place-
[fol. 83] ment of coal cars in coal mine service cannot be met without the simultaneous strict performance by all carriers west of the river of all outstanding orders designed to move coal cars into the east. The cancellation of CCS-33 should not be construed as indicative of any lack of necessity for the movement of coal cars from western line back to the east.

W. C. Kendall, Chairman.

Defendant rests.

Plaintiff's Evidence in Rebuttal

Testimony of Frank Tennyson

Direct examination by Mr. Tedrick:

My name is Frank Tennyson; live at Oxly, Missouri, and did in June, 1920, load*ing* mine props for Rash. I began working for him about the first of June, and worked pretty steady up until about December. I don't have much of an idea how many cars Rash loaded out during the months of June, July and August, 1920. On an average we would load ten or fifteen cars a week. Sometimes we loaded from the trucks. Sometimes we held the cars there possibly two days for loading.

Q. Do you recall hearing Mr. Powers make any statement relative
[fol. 84] to why Mr. Stroud didn't get cars?

By Judge Sheppard: That is not rebuttal of anything; and if it is for the purpose of impeachment, Mr. Powers' attention wasn't called to any time or place.

By the Court: Objection overruled.

To which ruling of the court, the defendant, by counsel, did then and there duly object and except at the time.

Q. What was said, if anything, as to why Stroud didn't get cars, that was last year, in the hotel room, what did Powers say?

A. He said he didn't put out enough money, Stroud said that—Powers said that. Powers said Stroud did not put out enough money. Herbert Breese, Pete Wise, and I were present and heard him say that.

One time plaintiff was delayed in loading his car on account of not being able to get a crew. I was in the crew that wanted more money. That car was loaded out on the Monday following the Saturday that the crew wanted more money, loaded by a crew that he got somewhere else.

Cross-examination by Judge Sheppard:

Mr. Powers did not say that Stroud didn't pay his hands enough money to get the cars loaded, I understood it was for cars. He said if Stroud had put up more money, he would have gotten more cars. [fol. 85] I don't remember just what was said immediately before that. We were up there in a room at the hotel, Messrs. Cope and Tedrick were there, too. I don't recollect what was said just before that or just afterwards. I don't recollect what all was said, they were talking of the case.

Q. What did they say, I would like for you to tell me just exactly what else was said up there?

A. I don't recollect now.

Q. You don't recollect a thing?

A. I recollect that.

Q. But nothing else?

A. I can't recall anything else.

TESTIMONY OF HEBRERT BREESE

Direct examination by Mr. Tedrick:

My name is Herbert Breese; I live at Oxly, Missouri. In June, July and August, 1920, I was loading for Rash there. I know the plaintiff who was at that time running a sawmill, putting out lumber. Rash loaded, oh, fifty or sixty cars a month, I don't know just how many. I worked steady for him. I was in that bunch that Stroud tried to get to load a car there and we refused to load on account of his refusal to pay enough. That car was loaded out on Monday following the Friday he tried to get us to load it.

I heard Mr. Powers say something along in June of last year, as to why Stroud couldn't get cars. He said if he had put up a little [fol. 86] money, a little more money, he might have got cars. That was in a room at the Grand Avenue hotel.

Cross-examination by Judge Sheppard:

I didn't hear anybody ask Powers the question about it. He just up and said it, that's all I remember. We were talking about cars and things. I don't remember just the words which were said. Powers was not talking about paying his men more money. I know he wasn't talking about that. I don't remember what was said immediately before that. I know what he said; he said "If you had put up more money you might have got more cars." He could have been referring to some kind of a question that he had been asked, with reference to paying the men for loading the cars, but the talk wasn't running along that line. I don't remember just the particular words it was running on, though. One other thing they were talking about was Dicus' telegrams. They asked Clell where the telegrams were, and he said they would be shown up here; that's all I remember.

Testimony of Peter A. Wise

Direct examination by Mr. Tedrick:

My name is P. A. Wise; I live at Oxly, and did in June, July and [fol. 87] August, 1920. At that time I wasn't working; I had been in the mercantile business there, just shortly before that. I know the plaintiff. I don't know anything about the difficulty he had in getting cars at Oxly, except what he told me, that is, that he had trouble getting cars. I never heard Mr. Clell Powers say anything about why Stroud couldn't get cars.

Plaintiff rests.
Defendant rests.
And this was all the testimony.

Defendant's Requested Instructions to Jury

The defendant here offered and requested the court to give to the jury a peremptory instruction in the nature of a demurrer to all the testimony; a copy of said peremptory instruction being in figures and words, as follows: (Omitting the caption).

"Now at the close of all the evidence offered in this case the court instructs the jury that under the law and the evidence your verdict in this case must be for the defendant."

Which said peremptory instruction, so offered and requested to be given by the defendant, the court failed and refused to give to the jury; and to the action of the court in so failing and refusing to give said peremptory instruction to the jury, the defendant, by counsel, [fol. 88] did then and there duly object and except at the time.

And thereupon, the plaintiff offered and requested the court to give to the jury the following instructions in this cause:

"Instruction No. 1

"The court instructs the jury that if you believe and find from the evidence in this case that the plaintiff, Roy Stroud, had, on the 12th day of June, 1920, a quantity of lumber placed at Oxly, Missouri, a station on defendant's railroad; that said lumber was deposited at the placed provided by defendant for receiving such shipments; and that plaintiff on said date made application to defendant's agent at the said station for cars in which to ship his lumber; and that he tendered said lumber for shipment under the terms and conditions imposed by defendant; and if you further find that after the said cars were ordered by plaintiff and his application for same was filed and before said cars were delivered other shippers at the said station of Oxly, Missouri, engaged in the business of shipping lumber over defendant's railroad, ordered cars from defendant's agent at the station aforesaid, and that the defendant delivered cars to these

shippers in preference to plaintiff and that the cars delivered to these shippers were not to be used for shipping mine props or other mine material that had a preference under the Interstate Commerce Com-
[fol. 89] mission's rulings, offered in evidence; and if you further find that such preference, if any, resulted in a loss to plaintiff, then your verdict must be for plaintiff for such sum as you believe from the evidence he has been damaged, not to exceed $1,000.

"Instruction No. 2

"The court instructs the jury that if you find for the plaintiff, you should, in assessing his damage, take into consideration the reasonable market value of plaintiff's lumber at the date the cars ordered by plaintiff, on the 12th day of June, 1920, should have been delivered by the defendant, allowing defendant a reasonable time in which to make said delivery, and the reasonable market value of the lumber at the time defendant did deliver the cars so ordered, and your verdict should be for the difference between these two amounts not to exceed $1,000.

"Which said instruction, and each of them, so offered and requested to be given by the plaintiff, the court gave to the jury; and to the action of the court in so giving said instructions, and each of them, to the jury, the defendant, by counsel, did then and there duly object and except at the time.

"The defendant here offered and requested the court to give to the jury the following instructions in this cause:

[fol. 90] "No. 4

"The court instructs the jury that if you believe and find from the evidence in this case that on June 12th, 1920, plaintiff placed with the agent of defendant at Oxly, Missouri, an order for two cars to be loaded with lumber to be shipped from Oxly, Missouri, to St. Louis, Missouri, and that afterwards, on the 22nd day of July, 1920, defendant furnished said cars to plaintiff at Oxly, and that plaintiff held said cars at Oxly for four days and failed to load same, and consented that said cars might be delivered to A. M. Rash for loading, which was done, then your verdict should be for the defendant.

"No. 5

"The court instructs the jury that although you may believe and find from the evidence that the agent of defendant at Oxly furnished cars for loading lumber to other shippers than plaintiff after plaintiff had ordered cars and before furnishing cars to plaintiff, yet before you can find a verdict for the plaintiff you must further believe and find from the evidence that said cars so furnished said other shippers were furnished on orders made by said other shippers since the orders of plaintiff, or that said cars were not furnished other shippers to facilitate the movement of coal as required by the Interstate Commerce Commission."

[fol. 91] "Which said instructions, and each of them, so offered and requested to be given by the defendant, the court gave to the jury; and to the action of the court in so giving said instructions, and each of them, to the jury, the plaintiff, by counsel, did then and there duly object and except at the time."

ARGUMENT OF COUNSEL

And thereupon, after argument of counsel, the jury returned into court the following verdict in this cause (omitting caption):

VERDICT

"We, the jury, in the above entitled cause, find the issues for the plaintiff, and assess his damages at the sum of one thousand dollars.

"Sam Tate, A. Y. Moore, Jack Bell, S. E. Cox, C. C. Estes, W. T. Tucker, John Ridlin, W. A. Chewning, F. E. Smelser."

NOTATION RE JUDGMENT

And afterwards, to-wit, on the twenty-seventh day of March, A. D. 1922, the same being one of the days of the regular March Term, 1922, of said court, and the same term at which the verdict of the jury was rendered in this cause, the court rendered and duly caused to be entered of record, its judgment herein; a copy of which said judgment is now on file in this court.

To which action of the court in rendering said judgment, the defendant, by counsel, did then and there duly object and except at the time.

And afterward, to-wit: on said thirtieth day of March, A. D. 1922, it being one of the days of the regular March Term, 1922, of the [fol. 92] Circuit Court within and for the County of Ripley and State of Missouri, and the same term at which the verdict of the jury was returned in this cause, and the judgment of the court rendered in this cause, and within four days of the date on which the verdict of the jury was returned in this cause, the defendant filed in this court its motion for a new trial of this cause; a copy of which said motion is as follows (omitting the caption):

"MOTION FOR NEW TRIAL AND ORDER OVERRULING SAME

"Comes now the defendant in the above entitled cause, and moves the court to set aside the verdict of the jury heretofore rendered in this cause at this term of this court and within four days prior to the filing of this motion, and to grant defendant a new trial herein, and as grounds therefor states:

"First. That the court erred in admitting incompetent evidence on the part of the plaintiff.

"Second. That the court erred in excluding competent evidence offered on behalf of the defendant.

"Third. Because the verdict of the jury was against the evidence and against the weight of the evidence produced at the trial.

"Fourth. Because during the guaranty period under the Transportation Act of 1920, the control of the furnishing of cars continued under Federal control, and that during such period suits [fol. 93] could not be brought for the failure to furnish cars, or the discrimination in so doing or refusing to do so, under any state law.

"Fifth. Because the court erred in giving to the jury instructions Nos. 1 and 2 on behalf of plaintiff, and in refusing defendant's instruction No. 2-A."

Which said motion for a new trial was by the court on the same day overruled, by its order duly entered of record. To which action of the court in overruling defendant's motion for a new trial of this cause the defendant, by counsel, did then and there duly object and except at the time.

And afterward, to-wit, on the same day, the defendant filed in said court its motion in arrest of judgment in this cause, which said motion is as follows (omitting caption and signatures):

"Motion in Arrest of Judgment and Order Overruling Same

"Comes now the defendant in the above entitled cause, and during the same term at which the cause was tried, and within four days after the verdict was rendered, and files its motion in arrest of judgment, and as grounds therefor states:

"First. Because upon the whole record the judgment is erroneous.

"Second. Because the court had no authority to render any judgment on the verdict in this case for any alleged discrimination in the failure to furnish cars to the plaintiff by the defendant under [fol. 94] the laws of the State of Missouri, for the reason that at the time the alleged discrimination happened in this case, the defendant was controlled by the Federal law as to the furnishing of cars and not by the State laws.

"Third. Because the court had no authority under the State laws to treble the damages assessed by the jury in this case, for the reason that the Federal laws controlled the whole subject of furnishing cars during the period of Federal control, and that the Transportation Act, 1920, continued said act in force during the guaranty period, and thereby suspended all penalties under State laws during said guaranty period, which said period included the time when plaintiff's alleged cause of action accrued."

And afterwards, to-wit, on the same day, it being March 30, 1922, the court by its order duly entered of record, overruled said motion in arrest of judgment by its order duly entered of record to which action of the court in overruling its said motion in arrest of judgment, defendant, by counsel, did then and there duly object and except at the time.

And afterwards, on the same day defendant filed in said court its application and affidavit for an appeal of said cause to this court, which said application is as follows (omitting caption and signatures):

[fol. 95] "PETITION FOR AND ORDER ALLOWING APPEAL

"Comes now J. C. Sheppard, attorney and agent for the defendant, who being duly sworn, upon his oath states that he is the agent of the defendant, and that the appeal taken herein is not made for vexation and delay, but because he verily believes the appellant is aggrieved by the verdict of the jury and the judgment of the court."

And thereafter, on the same day said court allowed appellant an appeal in said cause to this court, by an order duly entered of record, which said order allowed defendant time to file an appeal bond, and file its bill of exceptions; and that on September 7, 1922, within the time allowed by the court and by law for filing its bill of exceptions, appellant duly filed same in the office of the Clerk of the Circuit Court of Ripley County, by an order duly entered of record; said bill of exceptions having first been duly signed, sealed, allowed by Hon. Almon Ing, Judge of the Circuit Court of Ripley County, Missouri.

Respectfully submitted, Jas. F. Green and J. C. Sheppard,
Attorneys for Appellant.

[fol. 96] IN CIRCUIT COURT OF SPRINGFIELD COUNTY

APPELLANT'S BRIEF AND ARGUMENT IN SUPPORT THEREOF

Statement

The petition of the plaintiff is based on Section 9985 of the Revised Statutes of Missouri of 1919, and alleges in substance that respondent had about twenty thousand feet of lumber alongside the railroad track of appellant, which he desired to ship over appellant's railroad to St. Louis, Missouri. That on the 12th day of June, 1920, he ordered two cars from the agent of appellant to be placed for him for the purpose of loading and shipping said lumber. The petition further alleges that appellant discriminated against him and furnished other shippers, who desired to ship lumber from the same station on this road, with cars for that purpose on orders made by

other shippers after the order made by respondent on June 12th. That said orders which were made by other shippers subsequent to the order of the two cars made by respondent were filled before respondent's order, thereby discriminating against respondent.

The petition further alleges that owing to the delay in furnishing the cars for the shipment of respondents lumber, he was damaged in the sum of One Thousand Dollars, ($1,000.00) by reason of a drop in the market.

The answer of appellant admits its corporate existence, and admits that respondent had some lumber placed ready for shipment at [fol. 97] Oxly, Missouri, but denies he had as much as twenty thousand feet, and further denies that the plaintiff tendered said lumber for transportation under the terms by which that kind of freight was handled by defendant, and denies that plaintiff offered to pay to defendant the customary charges for the transportation of said lumber.

The answer further alleges that the order for the two cars made June 12th, 1920, by respondent, was filled by placing said cars ready for loading, but that respondent refused to load the same for a period of four days, and then voluntarily permitted one A. M. Rash to load said cars and ship the same. The answer further denies any discrimination against the respondent.

For another and further defense to the action of respondent, appellant states that it operates two lines of railroad from Oxly, Missouri, to St. Louis, Missouri; one of said routes being entirely within the State of Missouri; the other crossing the Mississippi River at Thebes, and going up to St. Louis through the State of Illinois; and that the usual and regular way of routing lumber from Oxly, Missouri, to St. Louis, Missouri, would be over the latter route, and was an interstate shipment, and that, therefore, the said Section 9985 of the Revised Statutes of Missouri of 1919 does not apply to this case.

The evidence in the case on the part of the respondent tended to show that he had placed on the right-of-way, on or about the 12th [fol. 98] day of June, 1920, about thirty-one thousand feet of lumber; that he sold a car load of this lumber to one Arnold, amounting to about eleven thousand feet, according to the testimony of respondent. Arnold himself testified that this car load contained eleven thousand six hundred and fifty-two feet. Respondent further testified that he sold other quantities of lumber from this pile to farmers, but was unable to state how much. On June 12th, 1920, respondent signed a written order for two cars, and delivered the same to the agent of appellant at Oxly, Missouri. He testified that this order for these two cars was never filled; that no cars were ever placed by appellant for the purpose of loading this lumber until August 19 and 23, 1920. He admits, however, that he sold one car load to Arnold, and Arnold testified that his car was loaded on or about August 23. Respondent testified that he received $60.00 a thousand, the market price, for this car from Arnold who had advanced him $600.00 on the car at a prior date. In this he was corroborated by Arnold. This disposed of one of the two cars ordered on June 12. The other car was furnished him four days previous

to that time, viz., August 19, in which he shipped car material. Respondent did not know how many thousand feet this car contained, but it was a large car, and he received $40.00 a thousand for its contents; and that car material did not come out of the 31,000 feet spoken of as being piled by the side of the track. The car shipped on August 23 came out of that pile. Respondent further testified [fol.99] that the Rash Timber Company was loading out a considerable number of cars through June, July and August, 1920, but was unable to state when the cars which the Rash people shipped out were ordered; yet he undertakes to say that they were ordered after his order was placed and filled before. When cross examined about this, however, it is disclosed that he did not know anything about when the Rash people's orders were placed. He finally stated that the order book showed what happened. Later on in the trial he offered in evidence the order book, which will be found in the abstract of this record opposite page 17.

The testimony on behalf of the appellant shows that respondent ordered these two cars on the 12th day of June; that there was quite a car shortage at that time, and in obedience to the Interstate Commerce orders, cars suitable for loading coal were required to be moved to the coal mines; that mine props and other coal mining material had the preference over other commodities. That these two cars were placed at Oxly for repondent on the 22nd day of July, 1920, and that he was unable to procure loaders and finally, on the 26th day of July, 1920, agreed that Rash might load these two cars out, which he did. This is testified to by Baird, the conductor, and Rash, and Crosson, the brakeman, and the station agent. Stroud denies this. The evidence further shows that under the order of the In- [fol. 100] terstate Commerce Commission, cars both east and west of the Mississippi River were required at that time to go to the coal mining districts and a preference was given by these orders to mine props and other coal mining material.

The order book referred to by respondent in his testimony, and by which he said he learned of the orders, was offered in evidence by respondent, and this book shows that the two cars were first placed for Stroud on July 22nd, and later on July 26th were given to Rash because Stroud could not load; that two cars were also furnished Stroud on August 19th. This book fails to show any order made by Rash after June 12, and filled prior to July 22nd.

[fol. 101] Points and Authorities

1

The court erred in refusing to give to the jury the instruction in the nature of a demurrer to the evidence, requested by appellant at the close of all the evidence, there being no evidence to show any unlawful or unreasonable discrimination against respondent, in the matter of furnishing cars for the shipment of his lumber.

II

The court erred in giving to the jury instruction No. 1 at the request of respondent.

(a). It failed to require the jury to find that if there were orders filed by other shippers subsequent to June 12, 1920, and filled prior to respondent's order, that the shipments made in said cars were intrastate, thereby making the Missouri statute applicable.

Sec. 9985, R. S. 1919.
Sec. 9993, R. S., 1919.
Steele v. Railroad, 165 Mo. App., 311.
Chicago, Rock Island & Pacific Ry. Co. vs. Farmers Elevator Co., 226 U. S., 426, 33 Sup. Ct. Rep., 174.
[fol. 102] Southern Railway Company v. Reid, 222 U. S., 424, 32 Sup. Ct. Rep., 140.
Erie Railroad Company v. People of the State of New York, 233 U. S., 671, 34 Sup. Ct. Rep., 756.
People v. Commission, 135 N. E., 197.

(b). Instruction No. 1 permitted the jury to find for respondent even though they believed that he was furnished cars on July 22, 1920; as they might have found there was discrimination prior to that date. For this reason it is in conflict with appellant's instruction No. 4, and it cannot be known which instruction the jury followed, and the error is not cured by the giving of instruction No. 4.

Murdock v. Dunham, 206 S. W., 915, and cases cited.

(c). Instruction No. 1 fails to require the jury to find that there was any undue or unreasonable preference.

Sec. 9985 R. S., 1919.

III

The court erred in giving to the jury instruction No. 2, at the request of respondent.

[fol. 103] (a). In laying down the measure of damages it fails to tell the jury what is meant by "market value", whether it is that value at the point of shipment or the point of destination.

(b). It limits the amount of recovery to the amount of "plaintiff's lumber"; but fails to tell the jury just what lumber is referred to; whether it was all of plaintiff's lumber before any of it was shipped, whether it was the remainder of the lumber after the carload of car material was shipped on August 19, or whether it was the remainder after both that car and the car of inch lumber shipped on August 23, were shipped.

(c). This instruction should have told the jury that respondent's damage was the difference between what he received for the two cars shipped on August 19 and 23, and what he would have received had these cars been furnished within a reasonable time after June 12.

(d). Instruction No. 2, failed to tell the jury that the market price should have been at the destination which was the controlling market.

Georgia Railway Co. vs. Live Stock Co., 92 S. W., 609.

IV

The court should have granted appellant a new trial on the ground that the verdict is not supported by the evidence. Respondent [fol. 104] ordered only two cars June 12, about which complaint is made. He received one car on August 19, loaded it with car material and sold it for $40 a thousand. There is no showing how much this car contained, but with a maximum load, shown by the evidence to be 20,000 feet, he would have lost only $400. He received another car on August 23, loaded it with lumber for which he received the full price, $60 a thousand, and on which he lost nothing. So that, a verdict for more than $400 cannot be supported by the evidence in this case, and this amount is speculative absent a showing of the contents of the car shipped on August 19.

[fol. 105] Argument

This is a suit for treble damages for undue and unreasonable discrimination in the furnishing of cars for the shipment of lumber based on Sec. 9985, R. S., 1919. The petition alleges that respondent ordered from the agent of appellant at Oxly, Missouri, on June 12, 1920, two cars for the shipment of lumber from that point to the city of St. Louis, Missouri. Afterwards other shippers ordered cars from appellant to be shipped from the same point, and that the cars subsequently ordered were furnished the other shippers prior to the time the two cars were furnished respondent, resulting in respondent's being discriminated against.

Respondent does not claim that he was discriminated against as to any other order for cars; but grounds his recovery solely on the failure of appellant to furnish to him the two cars ordered on June 12, 1920.

1

Taking respondent's testimony as true, and throwing aside all of appellant's testimony as to the date the cars were furnished, the demurrer to the testimony at the close of all of the evidence should have been sustained.

[fol. 106] Respondent's testimony shows that he ordered only two cars, those ordered on June 12, 1920; that one car was furnished him on August 23, 1920, which he loaded with lumber and sold to the witness, Arnold, for the sum of $60 per thousand, that being the market price of such lumber at that time, and the price fixed in the contract he had with Arnold prior to the time he ordered the car. His testimony shows that another car was furnished him on August 19, 1920, that he loaded it with car material, and sold it for the sum of $40 per thousand. The testimony fails to show how many feet

of car material was loaded in this car. There being no loss occasioned by the shipment of lumber which was sold to Arnold, and there being no testimony showing the loss which was occasioned on the car of car material, there is nothing upon which the jury could base a verdict for respondent; and the verdict rendered is wholly speculative. The burden being on respondent to sho wthe amount of his damages, and he having failed to do so; appellant's demurrer at the close of all of the evidence should have been sustained.

II

(a). Instruction No. 1 tells the jury that if other shippers ordered cars subsequent to the time respondent ordered cars, and that these shippers were furnished cars prior to the time respondent was, that unless they find these cars furnished other shippers were to be used [fol. 107] for shipping mine props or other mine material which had a preference under the rulings of the Interstate Commerce Commission, they should find for the plaintiff.

This leaves out of consideration entirely the question of whether or not the cars furnished other shippers were to be used in interstate commerce. It is appellant's contention that if any of such cars were so used, then respondent has no cause of action under the statute of Missouri, and his cause of action, if any he had, was under the Act to Regulate Commerce, which provides in Section 1 thereof, that the Interstate Commerce Commission shall have jurisdiction over the questions of the supply and distribution of cars; and Section 3 as amended February 28, 1920, provides:

"That it shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or ureasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

The cases cited under Points and Authorities II, (a), hold that:

"Where from the particular nature of certain subjects, the State may exert authority until Congress acts, under the assumption that [fol. 108] Congress, by inaction, has tacitly authorized it to do so, action by Congress destroys the possibility of such assumption, since such action, when exerted, covers the whole field, and renders the State impotent to deal with a subject over which it had no inherent, but only permissive, power." Chicago, Rock Island and Pacific Railway Company v. Hardwick Farmers Elevator Company, 226 U. S., 426, 33 Sup. Ct. Rep., 174, 176.

The burden of showing that the cars furnished other shippers before they were to respondent, which said cars had been ordered

after respondent filed his order for cars, had not been used in interstate commerce. This respondent failed to do; and the instruction failed to require the jury to find this as a fact precedent to respondent's recovery.

(b). Respondent's evidence by himself alone showed that no cars were furnished him between June 12, 1920, and August 19, 1920; appellant's evidence by four witnesses, shows that two cars were furnished him July 22, 1920. As the latter date was prior to the fall in the market price of lumber, respondent was not damaged if the cars were furnished him on that date, and he permitted another shipper to use them.

Respondent's Instruction No. 1, permits him to recover notwithstanding the jury may find from the evidence that the two cars were furnished him on July 22, because the instruction permits them to find that he was discriminated against prior to that date. [fol. 109] If such cars were furnished on that date, and respondent had loaded and shipped them at that time, he would not have been damaged as the price of lumber had not gone down on that date. Section 9990 R. S., 1919, fixing the penalty for discrimination provides that "such common carrier shall be liable to the person or persons injured thereby for three times the amount of damages sustained in consequence of the violation of the provisions of said section," referring to Sec. 8895 and others. So that, there can be no recovery, unless he is injured; and unless he failed to receive the market price of his lumber, he is not injured. In other words, before respondent can recover under the statute, for the penalty, or otherwise, he must show that he has been injured by reason of the discrimination, and the amount of his damages.

In addition to this, that part of instruction No. 1 is in direct conflict with instruction No. 4 given at the request of appellant, which tells the jury that if they find from the evidence that cars were furnished respondent on July 22, 1920, and that respondent failed to load them, but consented that they might be diverted to A. M. Rash, then respondent could not recover. So, we have instruction No. 1, telling the jury they may find for respondent if they find that he was discriminated against at any time, and instruction No. 4, telling them that unless such discrimination occurred subse- [fol. 110] quent to July 22, 1920, there can be no recovery by respondent.

Instruction No. 4 correctly declares the law as applied to the facts in this case, for the reason that respondent's testimony shows that the price of lumber had not fallen from the time he contracted to sell this lumber up to July 22, 1920. So that, if the cars were furnished on that date, respondent could not have been damaged as he would have received the contract price for his lumber.

It cannot be said that this error in instruction No. 1 is cured by appellant's instruction No. 4, because "an instruction which omits a necessary element to the maintenance of a plaintiff's case and directs a verdict is not aided by a correct one for the defendant,

for they are antagonistic, and it cannot be known which the jury followed."

Murdock v. Dunham, 206 S. W., 915, and cases cited.

(c). Section 9985 R. S., 1919, provides:

"It shall be unlawful for any such common carrier to make or give any undue or unreasonable preference or advantage to any particular person, company or firm, corporation or locality, in the transportation of goods, wares and merchandise of any character," etc.

This instruction No. 1 fails to require the jury to find that the discrimination was either undue or unreasonable. It merely re- [fol. 111] quires them to find that respondent was discriminated against, and tells them that if there was such discrimination, then appellant is liable in damages, regardless of whether or not the discriminatioi was reasonable, necessary, or what not.

III

(a). Instruction No. 2 given at the request of respondent tells the jury that the measure of damages is the difference between the "market value" of the lumber on June 12, 1920, and the "market value" at the time the cars were delivered, allowing a reasonable time after June 12, 1920, for their delivery. The instruction does not tell them where the "market" was, whether Oxly, Naylor, St. Louis, Chicago, or anywhere else. There is no testimony as to where respondent intended to ship the remainder of the lumber. It authorized the jury to speculate as to these matters without any guide, whatever.

(b). Instruction No. 2 tells the jury that in assessing respondent's damages, they should take into consideration the reasonable market value of "plaintiff's lumber". Just what is meant by the expression in quotation marks is not clear. Did it mean the entire pile of respondent's lumber before any was shipped? Did it mean the remainder after the carload of car material was shipped on August 19? Did it mean the remainder after the two cars were shipped [fol. 112] on August 19 and 23, respectively? Under this instruction the jury could figure respondent's damages on the basis of the entire amount of lumber remaining after the shipment of these two cars, in spite of the fact that respondent's evidence shows that he ordered only two cars, and that the cause of action is based upon the discrimination in furnishing two cars. Of course, when the two cars were furnished, respondent's damages ceased, and he could recover nothing more than he lost by reason of the failure to furnish the two cars, regardless of how much lumber was left in the pile near the track. It is evident from the amount of the verdict that the jury were led to believe that they had a right to assess damages on the entire amount of lumber remaining after the shipment in the two cars on August 19 and 23; and did so figure it, which would have

amounted to $1,200; but subsequent to August 23, 1920, respondent sold some of the remainder at prices which brought him the sum of $195, leaving a balance of $1,005, for which the jury gave him a verdict for $1,000.

(c). Instruction No. 2, should have told the jury that respondent could recover only the difference between what he received for the timber shipped on August 19 and 23, and what he would have received for those two carloads had the cars been furnished at the proper time. This is the proper measure of his damages, and the instruction is erroneous in not limiting his recovery to this amount.

[fol. 113] IV

Respondent pleads that appellant discriminated against him in the furnishing of two cars and two only. The statute under which he seeks a recovery is penal, providing for the trebling of the amount of damages fixed in the verdict of the jury. Such being the case, it must be strictly construed; and the courts should require respondent to bring his case, by his evidence, strictly within the statute, as well as strictly within his pleadings. Therefore, respondent cannot recover for any damages resulting from discrimination as to the furnishing of any cars other than the two mentioned in his petition.

Respondent had a contract with one Arnold by which he was to sell to Arnold a carload of lumber for $60 a thousand, and upon which the latter had already advanced him $600. That carload of lumber was shipped out on August 23, 1920; and respondent received the contract price. Therefore, he sustained no damages on account of discrimination as to the furnishing of that car.

The other carload of car timbers was shipped out on August 19, 1920. There is no evidence as to how many thousand feet that car contained; but there is evidence that the largest cars will contain a maximum of not more than 20,000 feet. This carload brought respondent $40 a thousand feet. How much he received for this carload is a matter of speculation; but in any event, it could not amount to more than $400.

[fol. 114] It cannot be claimed by respondent that had he received the two cars promptly he could have shipped all of his lumber and received $60 a thousand therefor, because he testified that the carload of car material shipped on August 19, 1920, did not come out of the lumber piled near the track. He further testified that he had about 21,000 feet left near the track, after he had shipped the two carloads on August 19, and 23, respectively. So that it is shown conclusively by his own testimony that he could not have shipped all of the lumber, including the car material, in two cars. In other words, respondent ordered two cars, shipped two cars, and had 21,000 feet left. His loss could not possibly have been more than $400 under the most favorable view of respondent's evidence, and it is clear that he is now attempting to make appellant pay for the slump in lumber prices.

In view of the many errors pointed out above, it is submitted that this case should be reversed.

Respectfully submitted, James F. Green and J. C. Sheppard, Attorneys for Appellant.

[fol. 115] WRIT OF CERTIORARI AND RETURN—Filed Nov. 6, 1923

UNITED STATES OF AMERICA, ss:

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the Springfield Court of Appeals of the State of Missouri, Greeting:

Being informed that there is now pending before you a suit in which Missouri Pacific Railroad Company is appellant, and Roy Stroud is respondent, No. 3245, which suit was removed into the said Court of Appeals by virtue of an appeal from the Circuit Court of Ripley County, Missouri, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Court of Appeals and removed into the Supreme Court of the United States, do hereby command you that [fol. 116] you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, the twenty-sixth day of October, in the year of our Lord one thousand nine hundred and twenty-three.

Wm. R. Stansbury, Clerk of the Supreme Court of the United States.

[File endorsement omitted.]

[fol. 117] IN THE SPRINGFIELD COURT OF APPEALS OF THE STATE OF MISSOURI

I, Frances P. Daniel, Clerk of the Springfield Court of Appeals of the State of Missouri, do hereby certify that the transcript of the record of the proceedings in this court in the above entitled cause, heretofore certified by me for filing in the Supreme Court of the United States of America, was correct and complete as the same then appeared in this court.

In pursuance of the command of the writ of certiorari issued out of the Supreme Court of the United States of America and directed

to the Springfield Court of Appeals of the State of Missouri, dated October 26, 1923, I now hereby certify that on the 3rd day of November, A. D., 1923, there was filed in my office a stipulation in the above entitled cause in the following words, to-wit:

"IN THE SPRINGFIELD COURT OF APPEALS OF THE STATE OF MISSOURI

STIPULATION

"It is hereby stipulated between appellant, Missouri Pacific Railroad Company, a corporation, and Roy Stroud, respondent, that the transcript already filed in the office of the clerk of the Supreme Court of the United States of America with the petition for the writ of certiorari be taken as the return to said writ, dated October 26, A. D., 1923.

[fol. 118] "Dated this second day of November, A. D., 1923.

Edw. J. White, James F. Green, J. C. Sheppard, Attorneys for Appellant. Cope and Tedrick, by R. I. Cope, Attorneys for Respondent."

I further certify that the above is a true and correct copy of said stipulation and of the whole thereof.

Witness, My official signature and the seal of the Springfield Court of Appeals of the State of Missouri, at the City of Springfield, in said State of Missouri this 3rd day of November, A. D., 1923.

Frances P. Daniel, Clerk of the Springfield Court of Appeals of the State of Missouri. (Seal of the Springfield Court of Appeals, Missouri.)

[fol. 119] [File endorsement omitted.]

FILED
SEP 14 1923
WM. R. STANSBURY
CLERK

TRANSCRIPT OF THE RECORD.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. [redacted] 1924

[redacted]

vs.

[redacted]

PETITION FOR WRIT OF CERTIORARI AND
TRANSCRIPT OF RECORD.

IN THE

SUPREME COURT OF THE UNITED STATES

THE MISSOURI PACIFIC RAILROAD COMPANY, A CORPORATION,
PETITIONER,
VS.
ROY STROUD,
RESPONDENT.
No. 547.

PETITION FOR WRIT OF CERTIORARI.

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To the Honorable, The Supreme Court of the United States:

Your petitioner, Missouri Pacific Railroad Company, a corporation, presents this, its petition praying that a writ of *certiorari* be granted, directing the Springfield Court of Appeals of the State of Missouri to certify to this Honorable court for its review, the record of said court in the case of Roy Stroud, Respondent vs. Missouri Pacific Railroad Company, a corporation, appellant, numbered 3245; and as grounds for this application petitioner respectfully shows to this court that Missouri Pacific Railroad Company is a railroad corporation organized and existing under the laws of the State of Missouri; is a common carrier of freight and passengers

through the State of Missouri and other States; that on January 25, 1921, there was filed in the Circuit Court of Ripley County, Missouri, a petition in the cause above mentioned whereby the said Roy Stroud sought to recover from Missouri Pacific Railroad Company under the provisions of Section 9985 of the Revised Statutes of Missouri, penalty provided by Section 9990 of the Revised Statutes of Missouri, of the revision of 1919, viz., three times the actual damages resulting to him by reason of an undue or unreasonable preference or advantage given by the carrier to other shippers over the said Roy Stroud, in the matter of furnishing cars for shipment of certain lumber owned by him. The sections of the Missouri Statute above referred to are as follows:

> "Section 9985. Discrimination Between Persons or Localities Prohibited.—It shall be unlawful for any such common carrier to make or give any undue or unreasonable preference or advantage to any particular person, company or firm, corporation or locality, in the transportation of goods, wares and merchandise of any character, or to subject any particular person, firm, corporation or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage with respect to such transportation; and all such common carriers shall afford equal facilities for the interchange of traffic between their respective lines, and for receiving, forwarding and switching cars and delivering property to and from their lines, and to and from other lines and places connected therewith, and shall not discriminate in their accommodation, rates or charges between such connecting lines and places. But this provision shall not be construed as requiring such common carriers to give the use of their tracks or terminal facilities to other common carriers engaged in a similar business."

> "Section 9990. Penalty—Triple Damages for Violation of This Law.—In case any such common carrier shall do or cause to be done any act or thing in Sections 9980 to 9994, inclusive, prohibited or declared to be unlawful, or shall omit to do any act or thing in said sections required to be done, then such common carrier shall be liable to the person or persons injured thereby for three times the amount of damages sustained in consequence of the violation of the provisions of said sections, together with a reasonable attorney's fee, to be

fixed by the court, which fee shall be taxed and collected as part of the costs in the case."

Your petitioner further states that said cause was duly tried in the Circuit Court of Ripley County, Missouri, and a verdict rendered in favor of the plaintiff, Stroud, and against the defendant, Missouri Pacific Railroad Company, for the sum of $1,000; whereupon the court as provided by said Section 9990 above set out, rendered judgment for Stroud in the sum of $3,000; that said cause was appealed to the Springfield Court of Appeals of the State of Missouri, where it was affirmed by said court on condition that the plaintiff remit $1,492.50. This remittitur was duly entered by plaintiff.

A timely motion for rehearing was duly filed in said Springfield Court of Appeals, which was by said court overruled on July 16, 1923. A certified transcript of the record of said Springfield Court of Appeals, consisting of the abstract of the record in said cause; the court's opinion therein, the motion for a rehearing filed by your petitioner, and the court's order overruling the same, are hereto attached and marked, respectively, Exhibits A, B, C and D.

The facts in the case, so far as they are material to this application, are: Stroud on June 12, 1920, ordered two cars from the agent of your petitioner at Oxly, Missouri, to be there delivered to him for the shipment of a quantity of lumber to the City of St. Louis, Missouri. It was claimed on the trial of the cause, and there was some evidence to that effect, that after the order for the two cars above mentioned was made by Stroud, other shippers ordered cars for the shipment of lumber from the same point to points outside of the State of Missouri; and that said last mentioned orders for cars were filled before the delivery by petitioner of the two cars to Stroud, resulting in discrimination, as it is claimed, in favor of interstate shippers and against Stroud, an intrastate shipper.

The Springfield Court of Appeals of Missouri filed its opinion in said cause in which it held that although an interstate shipper was given a preference over an intrastate shipper in the matter of furnishing cars, nevertheless the latter might recover from the carrier the penalty provided in Section 9990 of the Revised Statutes of Missouri, 1919, above set out, although the Congress of the United States of America had assumed control of the question by enacting the following Statute:

"That it shall be unlawful for any common carrier

subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

Section 3 Transportation Act, 1920, passed February 28, 1920; 41 Stat. at Large, 479.

The opinion of said court held that the section just quoted was not applicable to the facts in this case.

Your petitioner further shows to the court that the Springfield Court of Appeals of the State of Missouri is the court of last resort in this case; that no appeal, writ of error, writ of *certiorari*, or other proceeding may be had whereby this case may be re-heard by the Supreme Court of the State of Missouri for the reason that the ruling of said Springfield Court of Appeals is not in conflict with a prior ruling of the Supreme Court of Missouri on the same question.

Your petitioner further states that in the decision of this cause the Springfield Court of Appeals of Missouri failed and refused to apply the Statute of the United States set out, *supra*, which is controlling upon the question involved here, for the reason that it controls all interstate shipments, and provides the penalty to be assessed, if any; thereby nullifying the sections of the Missouri Statute quoted above in so far as discrimination in favor of, or against, interstate shippers is concerned.

Your petitioner further states that the Springfield Court of Appeals in so holding ruled contrary to the holdings of the Supreme Court of the United States in the cases of C., R. I. & P. R. R. Co. vs. Hardwick Farmers Elevator Company, 226 U. S. 426, and Southern Railroad Company vs. Reid, 222 U. S. 242, which hold that respecting discrimination between shippers, the "power of the State over the subject-matter ceased to exist from the moment that Congress exerted its paramount and all-embracing authority over the subject".

Wherefore, the premises considered, your petitioner prays that this Honorable Court issue its writ of *certiorari* directed to the Springfield Court of Appeals of the State of Missouri, requiring that the complete record in said cause in said court and its judgment therein, together with the motion for a rehearing and the ruling of said court thereon, be certified to

this court and that this Honorable Court will thereupon proceed to correct the errors complained of and reverse the judgment of the said Springfield Court of Appeals of the State of Missouri, and give to your petitioner such other and further relief as the nature of the case may require and to the court may seem proper in the premises.

MISSOURI PACIFIC RAILROAD COMPANY,
Petitioner.
By EDW. J. WHITE,
JAMES F. GREEN and
J. C. SHEPPARD,
Its Attorneys.

State of Missouri, }
County of Butler. } ss.

J. C. Sheppard, being duly sworn, says that he is one of the attorneys for the above named petitioner, Missouri Pacific Railroad Company; that he has knowledge of the matters and things set forth in the above petition, and of the conduct and proceedings had in the above entitled cause; and that he verily believes that the facts as stated in said petition are true.

J. C. SHEPPARD,

Subscribed and sworn to before me this 11th day of September, A. D. 1923. My commission will expire on the 10th day of December, A. D. 1925.

ETHEL E. HIGGINS,
Notary Public within and for the County of Butler in the State of Missouri, residing at Poplar Bluff, Missouri.

(Seal.)

TRANSCRIPT OF THE RECORD.

IN THE

SPRINGFIELD COURT OF APPEALS

OCTOBER TERM, A. D. 1922.
(POPLAR BLUFF CALL).

ROY STROUD,
RESPONDENT,

VS.

MISSOURI PACIFIC RAILROAD COMPANY, A CORPORATION,
APPELLANT,

No. 3245.

APPEAL FROM THE CIRCUIT COURT OF RIPLEY COUNTY, MISSOURI.

HON. ALMON ING, JUDGE.

APPELLANT'S ABSTRACT OF THE RECORD, STATEMENT, BRIEF AND ARGUMENT.

IN THE

SPRINGFIELD COURT OF APPEALS

OCTOBER TERM, A. D. 1922.
(POPLAR BLUFF CALL).

ROY STROUD,

RESPONDENT,

VS.

MISSOURI PACIFIC RAILROAD COMPANY, A CORPORATION,

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Abstract of the Record.

The petition upon which the above case was tried was filed in the office of the Clerk of the Circuit Court within and for Ripley County, Missouri, January 25, 1921, and is as follows (omitting caption and signatures):

"Plaintiff states that defendant is and was at the time hereinafter mentioned, a corporation duly organized and existing under and by virtue of the laws of the State of Missouri, and as such is permitted to sue and liable to be sued in the courts of this State; that defendant is now and was at the time hereinafter mentioned a common carrier and engaged in the business of transporting persons and freight for hire, in the doing of which it owned and operated among others a line of railroad from Oxley to St. Louis, both in the State of Missouri.

"Plaintiff for his cause of action states that on the 12th day of June, 1920, and for several months prior thereto he was engaged in the lumber business at Oxley, Ripley County, Missouri, that on the 12th day of June, 1920, he had placed ready for shipment at Oxley, Missouri, a station on the defendant's railroad, 20,000 feet of hardwood lumber, was at that time of the reasonable market value of $60.00 per M, and which he had contracted to sell at that price, provided same could be delivered within a reasonable time, and on that date made application for two cars of defendant's agent at the station of Oxley and requested that same be delivered to him at that station for the purpose of transporting his said lumber over defendant's railroad from Oxley, Missouri, to St. Louis, Missouri.

"Plaintiff states that all of said lumber was placed at the usual place. provided by defendant for receiving same; that he tendered said lumber for transportation under the terms which that kind of freight was handled by defendant and offered to pay to defendant the regular and customary charges for the transportation thereof, but plaintiff says that defendant wholly disregarding its duty to this plaintiff failed, neglected and refused to deliver for him within a reasonable time the cars so requested, and plaintiff further says that after this plaintiff had made application as aforesaid for the said cars and before same were delivered other shippers at the said station of Oxley made application to defendant for cars to be delivered at Oxly, Missouri, and a number of cars were

delivered to these shippers at the same place and for the same purpose as that requested by this plaintiff.

"Plaintiff says that by Section 9985 of the Revised Statutes of Missouri of 1919, it is made unlawful for any common carrier to make or to give any undue or unreasonable preference or advantage to any particular person, or firm, corporation or locality in the transportation of goods, wares or merchandise of any character, or to subject any particular person, firm, corporation or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage with respect to such transportation, yet plaintiff says that notwithstanding that, defendant was prohibited by the said Statute from discriminating against this plaintiff, such discrimination was made by the defendant aforesaid and no cars were delivered to this plaintiff until the 19th day of August, 1920; that as a direct result of defendant's unlawful, undue and unreasonable preference and discrimination against this plaintiff and its failure to deliver its cars within a reasonable time, as was its duty to do, plaintiff was unable to deliver said lumber to the purchaser thereof; that between the said dates of June 12th, 1920, and August 19th, 1920, there was a material drop in the lumber market and a material decrease in the demand for same, and plaintiff says that, at the time defendant did deliver its cars to him, he was unable to sell his said lumber in the regular lumber market at any price.

"Plaintiff further says that between the said dates of June 12th, 1920, and August 19th, 1920, the said lumber was exposed to the weather and was damaged to such an extent that it is impossible to sell same; and that by reason of all of which he has been damaged in the sum of $1,000.00.

"Wherefore plaintiff prays judgment against the defendant for the said sum of $1,000.00 and that upon ascertaining the amount of damages sustained by plaintiff the court will render judgment for three times the damage sustained as provided by Section A, 9990 of the Revised Statutes of Missouri of 1919, and for a reasonable attorney's fee to be assessed as costs, together with the costs of this suit."

The amended answer to said petition was filed in open court on June 27, 1921, and is as follows, to-wit (omitting caption and signatures):

"Comes now the defendant and by leave of court files its amended answer in the above entitled cause and admits

that it is a railroad corporation duly incorporated under the laws of the State of Missouri, as a common carrier of freight and passengers and operates a line of railroad from Oxly, Missouri, to St. Louis, Missouri, and other lines of railroad in Missouri and other States, and is engaged in interstate commerce.

"Further answering, defendant admits that plaintiff on the 12th day of June, 1920, had placed ready for shipment at Oxly, Missouri, a station on defendant's railroad, some lumber, but denies that the plaintiff had twenty thousand feet (20,000 ft.) or anything like such amount, and denies that said lumber could have been sold for sixty dollars ($60.00) per thousand then or at any other time.

"Further answering, this defendant states that it denies that plaintiff tendered the said lumber or any portion thereof for transportation under the terms which that kind of freight was handled by defendant, and denies that plaintiff offered to pay defendant the customary charges for transportation of said lumber, and denies that the defendant failed, neglected or refused to deliver to plaintiff within a reasonable time cars as requested by plaintiff for the purpose of shipping said lumber; but states that defendant did furnish cars to the plaintiff as ordered by him, June 12th, 1920, for the purpose of shipping said uumber and placed the cars ready for loading, and that plaintiff, after said cars were so placed to be loaded failed and refused to load same for a period of four days after said cars were so placed, and finally cancelled his order for said cars and voluntarily consented and permitted one A. M. Rash to load said cars and ship the same.

"Further answering, defendant states, that it denies that it delivered to other shippers at the said station of Oxly cars for shipment of lumber on orders by said other parties given after plaintiff had made his application for cars in preference to giving the cars to plaintiff; but states that all said cars, if any, delivered to other shippers, were either delivered on orders made prior to the order made by plaintiff, or in obedience to preferences made by the Interstate Commerce Commission.

"Further answering, this defendant states, that it denies that it, at any time, gave any undue or unreasonable preference or advantage to any one over that of the plaintiff, or to any particular person, company or firm in violation of

Section 9985 of the Revised Statutes of the State of Missouri of 1919, or any other law at any time.

"Further answering, and for another and further defense to plaintiff's cause of action, defendant states, that it moves its cars from Oxly, Missouri, to St. Louis, Missouri, over two routes: one over its line of railroad through the State of Missouri the entire distance from Oxly, Missouri, to St. Louis, Missouri; the other by way of Thebes, crossing the Mississippi River at that point, and going over the Missouri Pacific Railroad through the State of Illinois into the City of St. Louis, and that the usual and regular way of routing cars loaded with lumber at Oxly, Missouri, and consigned to the City of St. Louis, would be over the latter route, through the State of Illinois, and would be interstate commerce, and the Statute, Section 9985 of the Revised Statutes of the State of Missouri of 1919, has no application to the facts set up in plaintiff's petition, and this court has no jurisdiction to entertain plaintiff's cause of action.

"Further answering, defendant states, that it denies each and every allegation in plaintiff's petition contained, not herein specifically admitted or denied, and having fully answered asks to be discharged with its costs."

This cause was tried on March 27, A. D. 1922, in the Circuit Court of Ripley County, Missouri, the same being one of the days of the regular March Term, 1922, of said court, before a jury; and a verdict was rendered by said jury in favor of respondent and against appellant, in the sum of one thousand dollars; upon which verdict a judgment was duly entered in favor of respondent and against appellant for the sum of three thousand dollars, a copy of which said judgment is now on file in this court.

And thereafter, on March 30, 1922, during the same term of court at which the cause was tried, the verdict rendered, and the judgment entered, and within four days from the rendition of said verdict, appellant filed its motion for a new trial herein, which said motion was by the court on said March 30, 1922, the same being one of the days of the regular March, 1922, term of said court, overruled by its order duly entered of record. And on said thirtieth day of March, 1922, defendant filed its motion in arrest of said judgment; which said motion was on the same day overruled by said court by its order duly entered of record. And thereafter, and upon the same day, appellant filed its affidavit for an appeal of said cause to this court, which said application was

by the court granted, an appeal duly allowed, the docket fee of $10.00 paid to the Clerk of said court, and appellant was granted time within which to file its Bill of Exceptions, and time within which to file its appeal bond, all by an order of said court duly entered of record.

And thereafter, on September 8, 1922, within the time allowed by the court and by law for filing said Bill of Exceptions, appellant did so file the same duly signed, sealed, allowed and made a part of the record in this cause, by Hon. Almon Ing, Judge of the Thirty-third Judicial Circuit of the State of Missouri, and ex-officio Judge of the Circuit Court of Ripley County, Missouri, and the Judge before whom said cause was tried, by an order duly entered of record.

Said Bill of Exceptions is in words and figures as follows (omitting the caption and signatures):

Bill of Exceptions.

ROY STROUD:

Direct Examination.

By MR. TEDRICK:

My name is Roy Stroud; I reside about eleven miles east of Doniphan, Missouri, in Ripley County. In June, July and August of 1920, I was running a sawmill, making car material and inch and two inch lumber, about nine miles northeast of Doniphan, in Ripley County, Missouri, and about eight miles of Oxly, which was my shipping point.

On June 12, 1920, I made application in writing for two cars at Oxly. I did not care what kind of cars. At that time I had between thirty-one and thirty-two thousand feet of lumber located at Oxly. It was No. 2 common and better, inch and two inches thick, by wide, all lengths, from eight to sixteen feet long. The first car I got after I made the application was on August 19. I did not load out any cars between June 12 and August 19, 1920, because I couldn't get the cars, although I tried to.

Q. How often did you make application, or go to see about them?

A. Well, sometimes every day, sometimes not so often, maybe a week, or maybe it would be two or three days, just about whenever I would be there. The agent said he couldn't

furnish me the cars, he had to let Rash have them. I didn't get the cars.

The reasonable market value of my lumber on June 12, along about that date was sixty dollars, I think it was worth. That is what I was selling it for at that time, on the local market. The first I knew of the order being cancelled or the market being off, it was along in August, somewhere between the middle and last of August. At the time the cars were delivered, couldn't sell the lumber. I had no market for the lumber at that time.

I know C. H. Dicus at Poplar Bluff. In June, July and August, 1920, he was working for the railroad company. I also know A. M. and W. E. Rash, who were engaged in the timber business at Oxly along about that time, shipping lumber, car material, ties, mine props, mine caps. They sold their lumber to L. G. Black, at Naylor, Missouri. They sold him one car of inch lumber to my knowledge, and two cars of car material.

I was not at Oxly all the time, but the Rashes were loading every day I was. I don't know just what they loaded. Rash got cars after I had made my application and before my cars were delivered. He got a number of cars; I couldn't tell you how many. His mill was located west of the railroad station, on the south side of the track, loaded his lumber from the trucks that were run from the mill to the cars, and also from the stacks of lumber. I have known cars to stand on the siding waiting for him to load from the trucks for as high as four days. At that time I had my lumber stacked there ready for shipment, and couldn't get any cars to ship in.

Oxly is located on the Missouri Pacific Railroad, a branch of that railroad, the terminals of which are Neelyville and Doniphan, at the former place it connects with the main line, running north to St. Louis. That road is within the State of Missouri. A car of lumber loaded at Oxly for St. Louis, Missouri, could get there without leaving the State of Missouri, *via* the Missouri Pacific Railroad system. I designated St. Louis as the point of destination of my shipment; Oxly to St. Louis, both points in the State of Missouri.

I had a conversation with the station agent every time I was down there. At different times he said, "Your cars are next." When the cars came, Rash got some, A. L. Powers got some, and Leach got some. He said he had a tele-

gram from Dicus saying, "Let Rash have cars in preference to all others."

By Judge Sheppard: We object to that, the contents of a telegram not the best evidence.

By the Court: Objection overruled.

To which ruling of the court, the defendant, by counsel, did then and there duly object and except at the time.

A. The agent said if I would put out a little more money I might have got more cars.

Cross Examination.

By Judge Sheppard:

Q. When he told you that if you would put out more money you might get more cars, he and you were discussing the fact that you had tried to get loaders and wouldn't pay their price, wasn't that what he was talking about?

A. He had a reason for it.

Q. Isn't that what you were talking about? Isn't that what he meant, don't you know that is so?

A. No, sir; I don't.

Q. That is true, isn't it?

A. No, sir; it is not true. I ordered two cars to ship this lumber on June 12. My lumber was piled on the north side of the railroad, west of the station house, probably four telegraph poles away. Mr. Rash's loading place was right across the track about fifty yards west of mine, on both the north and south sides of the track. The switch is on the south side of the main track. I loaded my cars across the main line, as did Mr. Rash when he loaded from that side. My cars were not placed there until August 19, and then there was one car placed there for me. I loaded that one car with material, and sold it to a local buyer, L. B. Black, who had it engaged. He said nothing about the price having gone down. I don't know what the market price was, I was selling to a local buyer.

The railroad company did not place two cars for me to load on or about July22.

Q. And didn't they set there for three or four days, up until about the 26th, and in the meantime you talked with Mr. Rash, after you couldn't get any loaders, wouldn't pay the price that the loaders wanted, and you told him, you agreed with him, in the presence of Mr. Powers, for Mr. Rash to

have the cars, these two cars, and he went ahead and loaded them out, now isn't that true?

A. No, sir; not on that date. Mr. Rash loaded out cars after my order was placed on June 12. He shipped ties, lumber, mine props—that's all I know of directly. At that time I lived eight miles north of Oxly, and I stayed home at night and spent the day in Oxly part of the time. I reckon I was down there nearly every day, anyway four or five days out of the week. I could have shipped two cars in the month of July if I had the cars. I was in Oxly three or four times a week to see about shipping two cars a month. When there I stayed around town, along the railroad. I didn't stay up there and watch Rash loading lumber. I din't say I knew how many cars he loaded. He loaded one car of inch lumber some time in July, somewhere between the tenth and fifteenth. I don't know whether I was down there on July 22 or not, I have no recollection of it. I don't know of any other day I was there. Couldn't give you the dates of all the days I was there. Between the twelfth of June and the nineteenth of August, Rash loaded two cars of car material, and I don't know how many cars of ties; some time in July, I couldn't tell you whether that was before or after I placed my order for these cars. I know that he ordered cars way after I did, and got them before I did. He ordered cars every day. He had been shipping right along, way before that. Of my own knowledge, I don't know that Rash ordered cars after I ordered these and got them before I got my cars; I am going by your record, what it shows.

I had between thirty-one and thirty-two thousand feet of lumber there for shipment; and between nine and ten thousand feet were shipped out. I sold some of the other lumber I had there, about a thousand feet of it for $20.00 a thousand. I sold probably two thousand feet for $12.50 a thousand. I sold about seven thousand feet of it for $10.00 a thousand. That made about twenty thousand feet I had disposed of. Then I sold about six thousand feet of it for $8.00 a thousand. The remaining four thousand feet I hauled out home and used it on the farm. There was no market for it, only just selling little batches around to the farmers. It was worth $8.00 a thousand.

Re-direct Examination.

By Mr. Tedrick:

This book which is shown me is a book that the station

agent has in his possession at Oxly, Missouri, in which he keeps the record of the application for cars, and kept in June, 1920. I remember signing my name in that. I examined it on an average of once a week, anyway, through the month of July. The first time I examined it was the latter part of June, and the last time about the last of August or the first of September. When I examined it the last time if that notation there in that last line, was there like it is now, with reference to the cars I had ordered, I did not see it.

After I had shipped out the ten or eleven thousand feet, or whatever it was that I sold to Arnold, I had between twenty and twenty-two thousand feet left. That is the lumber that I sold according to schedule of prices that I just gave Judge Sheppard a moment ago. I was selling it to local buyers for the market; I am not positive of the market price.

Q. I am talking about the local market.

A. $60.00. I was selling it to Add Arnold.

I don't know anything about two cars being set in there for me on July 22. I never was notified of having any cars there. I was delayed one day loading a car on account of the crew, and I came to Doniphan and got a crew. That was in August, on a Saturday. I got a crew and loaded the car on the following Monday. That is the only time I had any trouble getting a crew.

Re-cross Examination.

By Judge Sheppard:

This is not the same car I was telling you about a while ago. I got one car on the 23rd, and got more cars later on. The first car was on August 19, which I loaded out with heavy car material. That is the one I came to Doniphan and got a crew to load. I got another car on the twenty-third and loaded it with inch lumber, and shipped both cars. The car loaded on the 19th was car material, and was a large car. I couldn't tell you how much there was in it. I got $40.00 a thousand for it. Then I loaded another car on the 23rd, and sold it to Add Arnold for $60.00 a thousand.

Q. Both of those cars come out of this 32,000 feet?

A. No, sir. These two cars on the 19th and the 23rd are all I got during that summer. I might have got some in September, but those two are all I got between June 12 and August 23. Then after the bottom dropped out, there wasn't

much doing in the lumber business and anybody could get cars then

Re-direct Examination.

By Mr. Tedrick:

When I said a while ago that I had approximately 31,000 feet, I did not include that in the car of car material that I shipped. I had reference to the inch and two inch stuff. The car shipped on the 23rd and sold to Add Arnold came out of the 31,000 feet. It had been sold to him prior to the date it was loaded. He bought it along about the first of June, and paid me $600.00 for it. That is the reason he took it; he advanced me $600.00 on this lumber. Rash was shipping all kinds of timber. Not all of the stuff he shipped were mine props and mine materials.

By Mr. Tedrick: I next introduce in evidence this record here, just identified by the plaintiff, this book—I want you gentlemen to notice these two columns, right here——

Which said exhibit is as follows:

(See exhibit opposite this page.)

ADD L. ARNOLD:

Direct Examination.

By Mr. Tedrick:

My name is Add L. Arnold; I reside in Naylor, Ripley County, Missouri. In June, July and August, 1920, I was engaged in the lumber business at Naylor, and was buying at different places over the country.

I know the plaintiff, and bought lumber from him along about those dates, at Oxly. I know what I was to pay him for the lumber, that was about the general market price. Number two common and better, the kind I was taking from him, was around $60.00 a thousand, F. O. B. cars. The lumber he had stacked there was number two common and better. I don't know the amount of feet he had stacked there from June 12 up until the middle of July; I had bought two cars, provided it was loaded before July 15th, for $60.00 a thousand. He did not get it loaded by that time. So, I cancelled the order that I had placed with him. I loaded one car after that, however. I had advanced him on the lumber, and took that car in order to get my money back. I made no esti-

OXLY, MO., STATION, 1920.

No. of Requisition	Date and Hour Order Was Filed	Name of Shipper Ordering	No. of Cars Ordered, Each Kind	Destination and Routing of Proposed Loading	Date Wanted	Number and Kind Furnished	Date Furnished 1920	No. and Date Loaded and Billed	Remarks
24	6-12-10 A	L. R. Stroud	Coal Box 2 Stock	St. Louis	At once	2 Coal	8-19-20	‡	Lbr.
25	6-15- 1 P	Leach L. Co.	C. B. 2 or Stk.	Chicago, Ill.	At once	2 Coal	7-22-20		Ties
26	6-15- 1 P	Leach L. Co.	1 Do	K. C. Mo.		1 Coal	7-22-20		Ties
27	6-16- 1 P	A. L. Powers	2 Do	St. Louis		1 Coal 1 Box	7-22 8-3rd		Ties
28	6-28-10 A	Park Bros.	1 Car			1 Bx	7-15		Chair Posts
29	7- 6- 1 P	L. R. Stroud	1 Car			1 Flat	8-19	x	Lbr.
30	7-12- 1 P	A. L. Powers	Coal Stk. 5 or Bx.	St. Louis	7-13	4 Stk 1 Coal	8-7 8-15		Ties
31	7-12- 1 P	Leach	2 Do	St. Louis	7-13	2 Stk	8-7		
32	7-12- 1 P	Leach	1 Do	K. C. Mo.	7-13	1 Coal	8-14		
33	7-12- 1 P	Leach	1 Do	C. G.W.Ry. K. C. Mo.	7-13	1 Coal	8-14		
34	7-13-12 Noon	A. M. Rash	5 Do	St. L & Bond	7-14	1 Coal 1 Box 3 Coals	8-3 7-28 7-22	‡	Ties & Lbr.
35	7-14-10 A	Sawner	5 Do	St. L. Air Line Jct.	7-14	1 Box 1 Coal 2 Box	8-14-20 8-24-20		Ties
36	7-17- 1 P	A. M. Rash	10 Do	St. Louis & Bond		1 Coal 2 Coal 2 Stk 3 Coal 2 Coal 1 Coal	8-28 8-3rd 8-12 8-14 8-24		Ties & Lbr.
						1 Coal	8-24-20		

				Bond		2 Coal 1 Coal	8-14 8-24		
37	7-22-10 A	W. E. Rash	4 Do	System Points		1 Coal 2 Coal 1 Box	8-24-20 8-26-20 8-27-20		Lbr., Ties, Props
38	7-24- 8 A	Leach L. & T. Co.	2 Do	St. Louis & Bond		2 Stk	8-19		Ties
39	7-29- 8 A	A. M. Rash	2 Do	Do		2 Coal	8-28		Ties & Lbr.
40	8- 9- 4 P	Leach L. & T. Co.	4 Do	Do		1 Stk 1 Flat 1 Box 1 Coal	8-19 8-24 9-13 8-24		Ties
41	8-11- 1 P	A. M. Rash	2 Do	Do		2 Coal	9-9		Props
42	8-11- 2 P	A. L. Powers	5 Do	Do		2 Coal 3 Coal	8-28 9-4		Ties
43	8-18- 2 P	Rash	3 Do	Do		3 Coal	9-13-20		Ties, P. & Lbr.
44	8-19-10 A	Stroud	3 Do	Do		3 Boxs	9-28-20		Lbr.
45	8-25- 1 P	W. E. Rash	3 Do	Sys. & Beyond	8-26	3 Coals	9-29-20	See from Order	Lbr., Props & Ties
46	8-27-10 A	Sawner	5 Do	St. Louis		4 Coals 1 Coal	9-30 10-2		Ties
47	9-11-8:15 A. M.	A. M. Rash	6	St. L. & Zigler		1 Coal 1 Box 2 Coals	9-27-20 9-28-20 9-30-20	2 Coals 10-5-20	Props & Ties
48	9-11-10 A	Leach L. & T. Co.	4	St. L. & Bey		2 Coals 2 Coals	9-27-20 9-30-20		Ties

‡ First placed July 22nd (July 26 given to Rash acct Stroud could not get crew). 2 Coal cars—Aug. 19-1920 later placed 2 coals.

mate of what remained after I got that car. I couldn't say how much he had left. I saw it, and would think there was in the neighborhood of 20,000 feet.

There was really no market for that class of lumber on August 19, 1920. You could not sell very much of that at a time at the local markets, at Oxly, Naylor, or other places around here. If you could sell any this inch lumber, number two common and better, was around $20.00 or $25.00, something like that at that time, but there was hardly any market for it.

Cross Examination.

By Judge Sheppard:

I took one car from plaintiff, which was loaded on August 23; I did not buy the car material, only different widths and lengths boards. I suppose he had the same kind of lumber left there that I had bought. We loaded the one car out of the stack that was there.

Re-direct Examination.

By Mr. Tedrick:

I don't remember just exactly the number of feet in the car we loaded out, but we paid him something around $600.00 all together. The number of feet of lumber you can load in a car depends on the size of the car; it would run from ten to sixteen thousand feet, in a real big car you can load 20,000 feet. You could load 31,000 feet in two cars if they were big enough.

Re-cross Examination.

By Judge Sheppard:

I testified in this case once before.

Q. I find from your testimony in that case you say this car contained 11,652 feet; I noticed from your testimony that you say this car contained 11,652 feet, was that right?

A. Well, I had the invoice at that time—it was something near that; I couldn't find the invoice this time, and I didn't bring it with me this time. Whatever I said at that time was correct.

GEORGE PURDOM:

Direct Examination.

By Mr. Tedrick:

My name is George Purdom; residence, Naylor, Missouri. I am now farming. I know the plaintiff, and have loaded car material for him, which he had sold to Black Lumber Company. I was the inspector for Black. That car was loaded in August, about the 23rd or something like that. I believe it was loaded on Monday or Tuesday, something like that. We went over there to load, and there was some dispute about the crew, and we came up here to get a crew; and we went down Monday and loaded out—that was on Saturday, that we came up here to get a crew.

Cross Examination.

By Judge Sheppard:

I testified in this case at the other trial.

Q. Was this question asked you and did you make this answer:

"Q. Did you hear Mr. Stroud testify about you loading cars—I'll ask you, did you load a car for him along in June?

"A. Well, I couldn't say,—it was somewhere last June or July; about the last of June or the first of July, a car of car material."

A. I loaded several cars for Mr. Stroud. I loaded the cars from June until August, with car material, the last one about August 23. I had loaded cars with car material for him before that, some in June and July. I couldn't say how many cars I loaded either in June or July. I suppose I loaded a car the last of June or the first of July, and another on August 23. I couldn't say how many I loaded, it wasn't my business to do that; I never kept any account, Black kept the record.

Re-direct Examination.

By Mr. Tedrick:

I took up car material for Rash about July, something like that, I couldn't say what months. The car material from Rash was sent to East St. Louis, care of the C. & A.

Plaintiff Rests.

The defendant here offered and requested the court to give to the jury a peremptory instruction in the nature of a demurrer to the testimony of plaintiff; a copy of said peremptory instruction being in figures and words as follows (omitting the caption):

"Now at the close of the evidence offered on behalf of the plaintiff, the court instructs the jury that under the law and the evidence your verdict in this case must be for the defendant."

Which said peremptory instruction, so offered and requested to be given by the defendant, the court failed and refused to give to the jury; and to the action of the court in so failing and refusing to give said peremptory instruction to the jury, the defendant, by counsel, did then and there duly object and except at the time.

Defendant's Evidence.

By Judge Sheppard:

I'll first read the testimony of A. M. Rash, as preserved in the Bill of Exceptions of the former trial of this case, which is as follows:

Direct Examination.

By Judge Sheppard:

My name is A. M. Rash. I live at Oxly, Missouri. I lived there last June, July and August of last year, and at that time, I was working for the Rash Timber Company, working for my brother. We were running a sawmill, getting out mine timber, mine props and mine ties, selling and shipping them, most of it from Oxly; that is where we shipped most of it from. On an average I do not hardly know how many cars we would ship in the course of a week, or month; the best week I ever run was 32 cars but we did not average that. Last summer, when business was good, we would average 60 cars a month. I know Mr. Stroud. He was shipping lumber from that place at that time. I do not know anything about the capacity of his business, about how many cars he shipped, I do not know anything about that. I remember two cars being placed at Oxly for Mr. Stroud to load some time last summer. I do not know about the date, but he did not load them.

By Mr. Cope: We object to that unless the time is fixed.

By the Court: Tell when it was.

By Judge Sheppard: About when was it, Mr. Rash?

By Mr. Cope: He's already testified that he didn't know.

By Judge Sheppard: Q. About when was it?

A. Well, I think——

By Mr. Cope: I object to what he thinks.

By Judge Sheppard: We have got the date here in writing.

By the Court: Give us your best judgment about it.

A. Well, I think it was in July.

By Judge Sheppard:

Q. If you had any conversation with Stroud about those cars, tell the jury what it was—what happened to the cars?

A. Well, I didn't have any conversation with him. I loaded the cars, he did not load them, and I did.

Q. Well, did you have any conversation with him in which he told you that he couldn't get hands and for you to go ahead and load them out.

A. Well, my understanding was that——

By Mr. Cope: (Interrupting.) We object to what he understood.

By the Court: Yes, objection sustained.

By Judge Sheppard:

Q. What did he tell you about loading the cars, if anything in that regard?

A. Well, he said he wouldn't pay the price for loading the stuff.

Q. Did he tell you anything about loading them out?

A. Well, he said I could load the cars.

Q. Did you load them out, or not?

A. I did.

Q. Who was present when he talked to you about that, if anyone?

A. Clell Powers, the agent.

By Judge Sheppard: That's all.

Cross Examination.

By Mr. Cope:

Q. Now, Mr. Rash, you stated a moment ago that you had no conversation at all with Mr. Stroud, is that true?

A. Yes, sir; I didn't have any conversation with him.

Q. Didn't have any conversation with him. Then didn't you just answer another question of Judge Sheppard's that you did have a conversation with him?

A. Yes, sir; I did.

Q. You don't know what date it was?

A. No, sir; I told you I didn't know the date. They were coal cars. I shipped about an average of 60 cars a month, last summer when business was good. They were principally coal cars they were shipping. I shipped them to Zeigler, Illinois, and West Frankfort, Illinois, principally. Some of the lumber, I do not know where they went to; it was sold to local buyers; and I do not know where it went, they shipped it. I never went over to see Mr. Dicus, I never met him in my life until the other day.

Q. Your brother, then, was that the one? You have a brother?

A. Yes, sir; my brother's name is W. E. Rash, has been a railroad man. I was not able to ship our stuff out as fast as we could get it out, could not get cars. It is not a fact that a number of times that cars were furnished me before I had a car load cut.

Q. And you would cut the lumber and take it to the car in a truck, just load it right off the truck into the car?

A. No, sir.

Q. They never did load them from the truck?

A. Oh, yes; they loaded from the truck; when they would be loading a car with certain kind of stuff, and the truck would come up with a load of them on it, when they would just load it into the car off the truck, so they wouldn't have to handle it again.

Q. Do you remember the conversation that you had with Stroud?

A. He just wouldn't load the car.

Q. Do you remember the conversation which you had with Stroud in which he told you—in which you told him that if he wanted to get cars from the Missouri Pacific Railroad that he would have to pay for them, that was the way you were getting them?

A. No, sir; I didn't tell him that; I didn't buy any cars. I do not remember the occasion of getting a statement and showing it to the boys, where they had me charged with a turkey that was given one of the railroad boys. It might have been my brother that sent the turkey to the agent at Oxly, and to Mr. Dicus, I don't know anything about his business. My brother, the Rash Timber Company, might have

given a number of the railroad employees turkeys during the year 1920, I don't know what he did. I was working for my brother. I made the application for the cars which the Rash Tie and Timber Company ordered, when I was there.

Q. How many did you apply for at the time?

A. Well, I have ordered as high as ten and fifteen. I had that much stuff there ready for shipment, all the time. I never got it all shipped; I threw away 42 bills of lading along about the first of the year. During the summer months when we run 60 cars a month we did not keep very well cleaned up; nothing extra; the lumber on the yards there we could have saved if we had had the cars. I made application just as I thought I would need them—I watched that to see, that was probably once or twice a week. I did order ten or fifteen cars once or twice a week, and then did not get what cars I wanted. I got about 60 cars a month, that would be my guess. I remember 32 was the highest I ever loaded out in one week. I do not think I ever had any application there at one time for 32 cars; I suppose the railroad company accepted my application for as many as ten to fifteen cars at the time. I am not the Mr. Rash that went to see Mr. Dicus and told him that my checks were being turned down, and that I just had to have cars, regardless of costs. I do not know whether my brother ever saw Mr. Dicus or not, he lives in St. Louis. He came down here quite often last year, about once a month. this material that I was shipping, it was all going to the coal mines, pretty well all of it. I do not know where the lumber was going, we didn't handle the shipping of that; the local buyer attended to that. I sold some lumber to the Black Lumber Company of Corning. I believe that was shipped in coal cars, I would not be positive, I did not think to pay any particular attention to it at the time. I don't think I have ever shipped any material from Oxly to St. Louis. I did not give my brother this list of railroad men to send these turkeys to, I do not know whether he knows them or not. I reckon he sent those turkeys just because he wanted to, that's all I know.

Q. Do you remember trading Mr. Stroud one coal car for two box cars?

By Judge Sheppard: If the court please, we object to that; we are charged here with discrimination, we couldn't help it if these two men traded cars.

By Mr. Cope: They are undertaking to get some testi-

mony in here that they set some cars out for Stroud, and that Rash loaded them out.

By Judge Sheppard: That was two cars; no trading done there, just released them to Rash.

By the Court: Go ahead and find out about it.

By Mr. Cope:

Q. You say these two cars that you loaded, that was placed there for Stroud, that you just loaded them out?

A. Yes, sir.

Q. He didn't tell you to load them, did he?

A. Well, he just refused to load them—in other words, he released them.

Q. He never said anything at all to you about them, did he?

A. Why, he just released them.

Q. He never said anything to you at all, did he?

A. Me and Mr. Stroud talked to the agent and Mr. Stroud said I could load them; that's all the conversation there was about them, that I could go ahead and load them. I think it was in July, I am not certain about the date. I do not think it was in August, that late. I am not swearing it wasn't in August. I wouldn't tell this jury that it wasn't as late as the 24th of August, am pretty sure it was not that late.

A. M. Rash, of lawful age, having been first duly sworn, was recalled, and testified further in behalf of defendant, as follows:

Direct Examination.

By Judge Sheppard:

I know where Mr. Stroud's lumber pile is down there. I went up there about a month ago, and looked at the lumber that is left there. It scaled about 6,500 feet.

By Judge Sheppard: That's all.

Cross Examination.

By Mr. Cope:

It is inch lumber, oak, the lengths, I think, 8, 10 and 12 feet. Clell and I just measured it to see about how much there was in it. He asked me to go with him, and I did so. I do not know how much there was on August 24, 1920. I had other business to see to besides that. I do not know how much there was there on June 12, 1920; I do not know any-

thing about that. I know why I went up there and measured it, because the agent asked me to go with him. I did not scale any two inch lumber. I did not scale that because the agent did not ask me to scale that, just scaled what the agent wanted scaled. He told me why he was scaling it, he said there was going to be trouble over it, so he wanted to know how much there was of it.

By Mr. Cope: Q. Did you know that you were going to be a witness then?

A. No, sir. I didn't.

I scaled that about a month ago, and there was little better than 6,000 feet. I have not my scale with me, but as I remember it, it was something about 6,500 feet.

CLELL POWERS:

Direct Examination.

By Judge Sheppard:

My name is C. A. Powers. I am a railroad station agent at Oxly, Missouri, for the Missouri Pacific, and was in June, July and August, 1920. I know the plaintiff who made an order for cars on June 12, and he made probably another one or two, I don't remember the date. That is the order which is shown on the book there, of June 12. He ordered two cars. That order was filled on July 22 but he did not load out the cars. He came to me and said he couldn't get a crew, and that he would like to let Rash have the cars, if he could get the next cars that came in on Rash's order. If I am not mistaken Mr. Rash was right there then. I switched the cars on Rash's yard, and he loaded them out. They were billed out on the twenty-sixth. They were placed at plaintiff's lumber pile originally.

Mr. Rash and I measured plaintiff's lumber pile, and estimated that he had about 8,900 feet, that was probably two or three months afterwards—a month or so, anyhow. I can't say whether he had sold any at the time we made the estimate or not.

Cross Examination.

By Mr. Tedrick:

Mr. Rash did the measuring. I was there with him. I did not check up the measurements or scale. All I know about it is what Rash told me.

By Mr. Cope: Then if the court please, we ask that all his testimony in that respect be stricken out.

By Judge Sheppard: Did he put down the—did you put down the amounts that he gave you when he measured it?

A. Yes, sir.

Q. Made a memorandum of it?

A. Yes, sir.

By Mr. Tedrick: We don't care about that.

Q. When was that?

By the Court: Well, if he is testifying to what somebody told, let it be stricken out; of course, if he knows of his own knowledge it is all right, but I understood him to say that he was testifying from what somebody told him, which wouldn't be competent.

By Judge Sheppard: All right.

A. I don't know how much lumber was there, any more than what Rash figured up. He shipped probably an average of 20 or 25 cars of lumber a month. He did not testify that he shipped about 60 cars a month. If he said so, he was wrong. I don't know what was the highest number or lowest number he shipped per month. He never did handle 60 cars in a month, but I don't know just haw many he was shipping a month. Those cars which were delivered to plaintiff were set in on July 22, I don't remember the day of the week.

I knew they were for him because he had an order in and was the next man out, and they were placed for him. These cars on July 22, were the first cars we had received after all earlier orders were filled; I don't mean they were the first cars received after his order was filled, but they were the first cars received after all earlier orders were filled.

From this record Stroud made his application at 10 o'clock A. M. June 12, 1920. This record shows his order was filled on August 19, 1920; but his order was first filled July 22, the record shows August 19. This line shows an order filed June 28, and filled July 15, for Park Brothers. That was after plaintiff's application was filed, and the car delivered before July 22. I had some kind of authority for that I don't remember now just what it was.

I am tolerably well acquainted with Rash. I got a turkey from him. Some of the train crew got turkeys from him; I don't remember whether they all did or not. I did not tell Stroud one time that the reason he didn't get cars was be-

cause he didn't put out the money, on the twenty-ninth day of June, 1921, in the presence of Pete Wise and Elbert Reece and Frank Tennyson.

Re-direct Examination.

By Judge Sheppard:

I said that if Roy had put up the money to get the car loaded, he would have got the car loaded, that is what I said, referring to the money for getting the crew for loading the car. Plaintiff's order for a car was filed on June 12; on July 22 we got eight coal cars, and there's a notation on the bottom here of this book which says, "First placed July 22nd; July 26th given to Rash account Stroud could not get crew, two coal cars. August 19, 1920, later, placed two coals. This memorandum up here check marked, that had reference to the second time that the cars came in there, but the other two were put in there on July 22.

The order made by Park Brothers on June 23, the book shows that that order was filled on July 15, and out here it says something about "chair parts". That lumber had laid there quite a while and it was damaged, the weather was damaging it, or something, and we had orders to ship it out, is the reason that car was furnished them at that time.

Re-cross Examination.

By Mr. Tedrick:

That was the car that was ordered and received by Park Brothers after plaintiff had placed his order on June 12; it was ordered on June 28 and delivered seven days before July 22. It was not damaged much, but it was in good shape to damage a good deal. That particular stuff was subject to the weather more than any other shipper's lumber down there, and I got a car. Stroud asked me about cars, and I showed him my authority I got from Poplar Bluff to let Rash have cars. Those orders were signed G. B. S., meaning G. B. Scott, chief dispatcher. I don't remember now just how the orders read. One of them said "Place so many cars, two or three, for Rash, for mine props, preference all other orders." I don't believe one order said, "Let Rash have cars preference to anyone else," probably so, but I don't remember it.

Re-direct Examination.

By Judge Sheppard:

The mine props went to the Illinois coal mines. There was a general order that they should go in preference to other things, they couldn't go anywhere except to the coal mines; they wouldn't let us route coal cars anywhere except to the mines.

Re-cross Examination.

By Mr. Tedrick:

I know C. H. Dicus. He might have sent some telegrams with reference to these cars, but they were not signed by him. At that time he was car dispatcher for the Missouri Pacific Railroad Company. I have heard he is not working for the company now; while he was, I took orders from him while he was so employed.

E. C. BAIRD:

Direct Examination.

By Judge Sheppard:

My name is E. C. Baird; I am a railroad conductor on the Doniphan Branch of the Missouri Pacific Railroad Company, and was June, July and August, 1920. I know the plaintiff, also Mr. Rash. Stroud had a lumber yard at Oxly along about that time. The best I remember he had lumber on both sides of the track there between the depot and the stock pen, which is on the right hand side going towards Neelyville. I know he had some on the same side of the track that the depot was on, but I wouldn't be positive about his having some on the other side of the track. I know there were some cars placed in there for him along the latter part of June some time—I mean July. Two cars were placed there along the latter part of July. I couldn't give you the exact date. They were afterwards turned over to the Rash Lumber Company, loaded out and shipped. The brakemen at that time were Crossen and Withan, the latter working extra.

Cross Examination.

By Mr. Tedrick:

I couldn't tell you how much lumber plaintiff had stacked

down there. I think at that time he had lumber on the left hand side going towards Neelyville; he may have had lumber on both sides, I couldn't say as to that. I knew no more about where his lumber was than just spotting the cars the latter part of July. At that time the car situation was very short, we didn't set out lots of cars at that time. I couldn't say what the average number of cars which were set out along about that time. We set out cars for Rash Lumber Company, Stroud and the Powers Tie and Timber Company. I don't remember that anyone else was loading out at that time. At that time Rash was loading all the cars he could get a month, I couldn't say how many; I know he was shipping a good many mine props. He was not shipping as many as 20 a month at that time, because he couldn't get them; he might have if he could have got them, but I don't think he shipped that many because he couldn't get them. I don't think any of these shippers got that many cars a month.

I said we placed these two cars for Stroud and then changed them over to Rash upon the orders of the station agent; we placed cars according to his instructions, have nothing to do with that ourselves. I know Rash pretty well. He gave me and the entire train crew turkeys.

Re-direct Examination.

By Judge Sheppard:

We haven't a thing in the world to do with the placing of his cars; he had given me a turkey before that, before he ever went into business, a couple of times before that when he was at Naylor with a corn crusher. He was using cars at that time, too. The agent at Oxly gave us orders to place these cars for plaintiff in the first place, and changed them to Rash upon his orders; we have nothing to do with the placing of cars outside of the instructions we get from the agent.

J. A. CROSSEN:

Direct Examination.

By Judge Sheppard:

My name is J A. Crossen; my home is at Fair Dealing. I have lived in this county 23 or 24 years. I was working on the Doniphan Branch as a brakeman in June, July and Aug-

ust, 1920, and had been working on that train in that capacity around thirty years, something like that.

I know the plaintiff, and know he said he had some lumber at Oxly in those months. His lumber pile was a little the other side of the stock pen, between there and the depot, on the left side of the track, going east. We placed a couple of cars there for him, along about the 20th of July. After a few days, we had to place them for a man that was loading mine props, Rash. We moved them up this way from there. I don't know who loaded them, they were taken out

Cross Examination.

By Mr. Tedrick:

They were coal cars. The cars were placed for plaintiff first, so they told me, about July 20, along towards the middle of the month or a little later. He had ordered them and then we had to move them away, upon the instructions of the agent who had told us to put them there in the first place. I don't know why plaintiff did not load them.

I don't know how many cars we usually set out a day during those months; some weeks we would set out more than others. I don't remember how many. Rash was doing a good deal of shipping down there, and was getting more cars than anybody else, I think. I wouldn't say how many cars he used during a week or month. I know him. It was the young Rash who gave me the turkey, that is, he said he would give me one, but I never did get it. Said it was over to the chicken house. I did not go to Goodwin & Jean's to get mine; they said it was over there; but I never did get it. I did not testify in this case before; I didn't know about it. If the conductor did, I didn't know it; I never heard him say anything about it.

Re-direct Examination.

By Judge Sheppard:

The turkey that they told me about having left over there for me, did not have anything to do with placing these cars. It was the young fellow that gave me the turkey; the old gentleman was the one that was there when the cars were being placed. We placed cars under the conductor's instructions, he has the switch list, that shows where the cars are to

be placed. We obey his orders, and he gets his instructions from the station agent.

P. H. WITHAN:

Direct Examination.

By Judge Sheppard:

My name is P. H. Withan; I am a brakeman on the Missouri Pacific. I was working extra at Hoxie in June, July and August, 1920. In July some time I worked on the Doniphan Branch, something like nine days. I couldn't say when it was, the conductor kept my time, I suppose. I had my time down on a book myself, but I misplaced it. I remember being in there west of the depot at Oxly, close to the stock pens, more than one time, but I don't remember anything about this case.

G. J. HIDINGER:

Direct Examination.

By Judge Sheppard:

My name is G. J. Hidinger; reside at Oxly, Missouri, and have a little over two years. I have been in that neighborhood nearly fourteen years. In June, July and August, 1920, I was running a feed store at Oxly. I know the plaintiff, and know about some lumber he had on the railroad to ship. I saw it a number of times. He had a lot of inch lumber, and then he had some kind of square timber, I don't know what you would call that lumber, some planks or boards, and then some two by fours. I never dealt in lumber any; I have worked at the carpenter trade a good deal. I know good lumber and I know bad lumber when I see it. This lumber which I saw was red oak. There was some inch stuff, one by wide, I believe a couple of stacks of that, and then there was this heavy stuff, car stock, ties, or some other heavy kind of timber. It was second grade lumber. When I examined it, there was somewhere in the neighborhood of ten thousand feet of it. I don't think he shipped any out after I saw it, but I don't know about that. I bought one stack of lumber myself, there was two stacks at the time I bought one. I bought between four and five thousand feet of it, I believe in

August, I wouldn't say for sure. I paid a dollar a hundred, some time in the fall. I don't recollect just when it was.

Cross Examination.

By Mr. Tedrick:

I saw them piling the lumber there, but I don't remember just when it was; I didn't pay any attention to the date. The best I remember I bought this lumber in August, 1921. I couldn't say how long it had been there when I bought it, because I didn't pay any attention to that.

I know what number two common is in dressed lumber. When I said this was second grade lumber, I didn't get that from the lumber market. In dressed lumber it is lumber with a few knots, a few faulty places in it. I do not know what that lumber was worth in June or July, 1920, on the market. I don't know how much he had then or how much he sold. All I know is I bought one stack of lumber at ten dollars a thousand.

R. R. POWERS:

Direct Examination.

By Judge Sheppard:

My name is R. R. Powers; live at Oxly, Missouri, and know the plaintiff, and did in 1920. I know he had quite a bit of lumber down there at Oxly; I had a conversation with him about loading some cars of timber, about getting hands. One day I was coming to town, and he came up with me on the same train, he said he was coming after a crew, said his crew at Oxly had struck on him. I don't remember the date, have no idea about it.

By Judge Sheppard: I now read in evidence the deposition of George W. Briece, taken in this case on the 20th and 21st day of June, 1921, in St. Louis, Missouri, at the Railway Exchange Building, Room 1109, before J. C. Hopewell, Notary Public, on the part of the defendant; I'll just offer that part of it with regard to the two lines of railroad. This deposition is found on pages 37 to 45, both inclusive, of the Bill of Exceptions now on file in this court, and is as follows:

Direct Examination.

By Mr. J. C. Sheppard:

My name is George W. Briece; my residence, St. Louis, Missouri, and I am Superintendent of Transportation of the Missouri Pacific Railroad Company. I occupied the same position during June, July and August, 1920. As such official of the Missouri Pacific, I have personal knowledge of the car situation, particularly with respect to so-called coal cars on the line of the Missouri Pacific during the months above mentioned.

Q. This suit is for alleged discrimination, it being claimed by plaintiff that he placed on order with the Missouri Pacific agent at Oxly, Missouri, on the 12th day of June, 1920, for two cars for the purpose of loading and shipping lumber to St. Louis, Missouri, and it is alleged by plaintiff that cars for lumber loading were furnished other shippers out of order, and in preference to his order, thereby discriminating against him. Will you please state fully all facts regarding the car situation during the time in question, particularly with respect to any orders from your office or elsewhere, that might affect the distribution of such equipment.

By Mr. Cope: (Interrupting reading of deposition). We object to the answer to that question, for the reason that the situation and condition of shortage of cars wouldn't license any discrimination between shippers of the same kind of material, as to coal cars, or any other cars; it wouldn't make any difference in this case, and wouldn't be any defense; and it is only offered here for the purpose of getting something to the jury that is not competent; he asked concerning the car situation at that time, as to whether or not there was any shortage wouldn't enter into this case, and wouldn't be any defense to it.

By Judge Sheppard: If the court please, in view of the testimony already given in this, we think it is competent to show the situation and also the orders from the Interstate Commerce Commission who controlled the roads, with reference to the furnishing of cars, which would take precedence over everything else.

By the Court: Go ahead, objection overruled.

To which ruling of the court, the plaintiff, by counsel, did then and there duly object and except at the time.

By Mr. Cope: We object to it for the further reason

that the Interstate Commerce Commission or any ruling of that commission wouldn't apply to this shipment.

By Mr. Tedrick: This is not any shipment at all, and for that reason don't come under the ruling of the Interstate Commerce Commission, we object to it on that ground.

By Mr. Cope: Your Honor, these are cars that were never delivered.

By the Court: Objection overruled.

To which ruling of the court, the plaintiff, by counsel, did then and there duly object and except at the time.

By Judge Sheppard: (Reading from deposition): "As early as May, 1920, there was a very severe shortage of coal cars, which class of cars is usually used for lumber loading. It, therefore, became necessary for the carriers to make certain orders giving coal shipments priority, so far as the distribution of this class of equipment was concerned. Most of these orders originated from the Commission on Car Service of the American Railroad Association. The carriers, according to the rules of the Interstate Commerce Commission, have a right to make reasonable rules and regulations with respect to the distribution of equipment, and if the commission deems it advisable to change these rules, or considers the emergency such that it is necessary for the commission itself to provide such rules, it handles the matter by appropriate orders. Under date of May 28, 1920, we received wire from W. C. Kendall, Chairman of the Commission on Car Service of the American Railroad Association, which telegram is offered in evidence as "Exhibit A" and is as follows:

"Effective immediately the use of coal-carrying cars for the loading of automobiles and other commodities which can be transported in box cars and other types of equipment is prohibited. Continuous low rate of coal production makes this policy an absolute necessity."

On June 2, 1920, our office received a further communication from Mr. Kendall which is attached to my deposition and made a part thereof, identified as "Exhibit B," and particular attention is called to the fourth paragraph reading as follows:

"Coal-carrying cars must not be used for the loading of automobiles and other commodities which can be transported in box cars and other types of equipment."

Upon receipt of these communications from Mr. Kendall, I immediately placed instructions with our various superin-

tendents to the effect that coal cars must be confined to the loading of coal, with the exception that they could be used for loading mine props destined to the coal regions. By the middle of June, the condition became so bad that the Interstate Commerce Commission issued its service order No. 7, dated June 19, 1920, a copy of which was served upon me and is atttached to this deposition and offered in evidence as "Exhibit C". Thereafter, on June 28, 1920, we received from Mr. Kendall further instruction tending to carry out the foregoing order of the Interstate Commerce Commission, which letter of Mr. Kendall is offered in evidence and identified as "Exhibit B."

On the strength of these orders, our agents were instructed not to permit coal cars to be used for loading other commodities, except such commodities as mine props and such other material destined to the mines, notwithstanding shippers might have orders in for cars to be loaded with lumber and other commodities of like character. In other words, the cars could be used for loading other commodities than coal, only on the return movement to the mines.

Q. What was the general condition as to the car shortage on the Missouri Pacific during June, July and August, 1920?

A. From June 12 to June 30th, we were short 1410 box cars, 228 flat cars and 383 coal cars. From July 1st to July 31st, our average daily shortage was 1,296 box cars; 239 flat cars and 244 coal cars. From August 1st to August 19th, our average daily shortage was 1,661 box cars, 248 flat cars and 300 coal cars. (There not being time to complete the taking of the depositions in this cause on June 20th, the further taking of said depositions is continued until tomorrow at the same place and between the same hours.)

Q. Please state how general routing instructions are issued by the railroad?

A. Routing instructions originate from my office and are incorporated in a printed circular.

Q. I will ask you to identify the document which I now hand you and have marked as "Exhibit E".

A. This is Routing Circular No. 42, issued by the Superintendent of Transportation of our line, November 5, 1911.

By Mr. Sheppard: "Exhibit" is offered in evidence and made a part of this deposition.

Q. Will you identify this other document that I am handing you, which is marked "Exhibit F"?

A. Exhibit F is Routing Circular No. 26, issued by Superintendent of Transportation December 1, 1920, which cancels Circular No. 42, which has just been identified as "Exhibit F".

By Mr. Sheppard: Exhibit F is attached to and offered in evidence as a part of this deposition.

Q. The petition alleges that plaintiff ordered certain cars on the 12th day of June, 1920, to be loaded with lumber and shipped to St. Louis, Missouri, from Oxly, Missouri. Will you explain the routing that would, or should have been given this shipment, according to Circular No. 42 identified as "Exhibit E", which was in effect from November 5, 1911, to December 1, 1920?

A. Turning to page 12 of Exhibit "E", you will find Oxly, Missouri, is in Group 114, and turning to page 14 of the same exhibit you will find St. Louis, Missouri, is in Group 1. Now turning to page 95 of the same exhibit you will find the station from which shipment is made designated in the group column at the left, and the station or group, to which the shipment is made designated at the top of the respective columns. Oxly, Missouri, as I have stated, was in Group 114, which is the fifth number from the top at the left of the page, Following this line over on the right to the column headed "Group 1" you will find the symbols "Q". This means that shipments between Group 114 and Group 1 take the routing symbol "QS". Turning now to page 140 of the same exhibit you will find the routing instruction "QS" explained as follows:

"Ivory Transfer, Illmo, Poplar Bluff."

This means that according to the routing circular, shipments moving between Oxly, Missouri, and St. Louis, Missouri, are routed east of the Mississippi River by way of Thebes Bridge and hauled back from Illinois to Missouri over the Ivory Transfer.

By Mr. Tedrick: We desire to object to that question, and move that the onswer be stricken out, for the reason it is immaterial, it doesn't tend to prove or disprove any of the issues in this case.

By the Court: What was the question?

(Question is read by Judge Sheppard.)

By Mr. Cope: Your Honor, this is not a shipment, they just made application for cars for shipment.

By the Court: The question is asked what route it should have or would have taken.

By Judge Sheppard: Yes.

By Mr. Tedrick: We take the position that it don't make any difference, as it wasn't any shipment at all.

By the Court: Objection overruled.

To which ruling of the court, the plaintiff, by counsel, did then and there object and except at the time.

By Judge Sheppard: (Continuing to read deposition.)

Q. If the cars were ordered as alleged in the petition, for shipment during June, July or August, 1920, from Oxly, Missouri, to St. Louis, Missouri, loaded with lumber, what would have been the routing instructions?

By Mr. Cope: (Interrupting.) We desire to offer an objection to that question Your Honor, and ask that the answer be stricken from the record, and the jury instructed to disregard it, for the reason that such routing instructions weren't in effect at the time this shipment was made, but on the contrary there was an Interstate Commerce ruling which forbid and prohibited the railroad companies from routing intrastate shipments outside the State, and which compelled them, forced them to ship in the State on the main line whereever it was possible to do so, and that was in effect at the time of the alleged shipment—application for these cars.

By the Court: You say there was an Interstate Commerce Commission ruling to compel them to ship wholly within the State where it was possible to do so?

By Mr. Cope: Yes, sir.

By the Court: Where is that?

By Mr. Cope: I understood that from the freight agent at Poplar Bluff, Missouri, Mr. Jeffords, that there was such a ruling; he told me that was the ruling and had been for quite a while.

By the Court: Is that all you know about it?

By Mr. Cope: And that this order had been cancelled, and that where it was possible to do so, the shipments were to be made within the State.

By the Court: In the absence of any showing there was such a ruling by the Interstate Commerce Commission, compelling railroads to ship their freight wholly within the State, where it was possible to do so, the objection will be overruled.

By Judge Sheppard: I know it isn't so, as I have an opinion of the United States Supreme Court holding absolutely to the contrary.

By the Court: Objection overruled.

To which ruling of the court, the plaintiff, by counsel, did then and there duly object and except at the time.

By Judge Sheppard: (Again reading from deposition):

A. As I have stated, the routing instructions according to Circular 42 would have been over Thebes Bridge and up through Illinois, and then back across the River at Ivory Transfer.

Q. Will you please explain why this routing circular provides for movement over the line of the Missouri Pacific, which runs up the east side of the river through Illinois, rather than a routing over the line of the Missouri Pacific, which runs up the west side of the river and is entirely within the State of Missouri.

A. The routing through Illinois is a matter of operating convenience and economy. The line running up the Missouri side of the river passes over Iron Mountain and other Ozark hills, and it is very expensive to handle tonnage over these hills. To avoid these hills the routing as given in the circular was over the much more level line, running up the Illinois side of the river.

Q. It is necessary for you to have back for permanent files the document offered in evidence and identified as "Exhibits A, B, C, and D," inclusive?

A. Yes, sir. It is necessary for me to have these documents back for my permanent records.

(Signed): GEORGE W. BRIECE.

Subscribed and sworn to before me this 21st day of June, 1921. My commission expires October second, 1921.

(Signed): J. C. HOPEWELL,
Notary Public, City of St. Louis.

By Judge Sheppard: I'll next introduce in evidence the telegram, Exhibit A, attached to Mr. Briece's deposition, which is as follows:

"Washington, D. C., 4:45 A. M.
"May 28th, 1920.

"W. A. Robertson,
"V. P. Missouri Pacific R. R.,
"St. Louis, Mo.

"Eeffective immediately, the use of coal-carrying cars for the loading of automobiles and other commodities which can be transported in box cars and other types of equipment is prohibited. Continuous low rate of coal production makes this policy an absolute necessity. Acknowledge.

W. C. KENDALL."

By Judge Sheppard: Next desire to introduce in evidence the circular, No. CCS-33, which has been identified as Exhibit B, attached to Mr. Briece's deposition, which is as follows:

"To Railroads:

"The production of bituminous coal during April and May has been averaging two and one-half million tons per week less than what is necessary for the country's adequate fuel supply, and particularly to permit a sufficient movement up lake to the northwest and ocean and rail to New England to protect next winter's consumption in those sections. The average placement on bituminous coal loading roads has been approximately fifty per cent.

"In order that coal production may be increased, and discrepancies in placement as between commodities made up, it is necessary that—

"1. Railroads must distribute available coal cars for loading coal to a minimum of fifty per cent of actual requirement before distributing coal cars for loading other commodities.

"2. Railroads may distribute available coal cars for loading other commodities requiring open cars to an extent not exceeding fifty per cent of actual requirements based on ability to load and ship, and any surplus as available shall be applied to increase the supply for coal loading.

"3. Railroads having no coal loading will restrict the supply of coal cars for loading of other commodities requiring open cars to an extent not exceeding fifty per cent of actual requirements based on ability to load and ship. Foreign cars used in this manner must be loaded strictly in accordance with car service rules, and must not be back hauled for loading.

"4. Coal-carrying cars must not be used for the loading of automobiles and other commodities which can be transported in box cars and other types of equipment.

W. C. KENDALL, Chairman."

By Judge Sheppard: Next I'll offer in evidence Interstate Commerce Commission Order No. 7, which is as follows:

Service Order No. 7.

At a general session of the Interstate Commerce Com-

mission, held at its office in Washington, D. C., on the 19th day of June, A. D. 1920.

It appearing in the opinion of the commission, that because of a shortage of equitment and congestion of traffic, aggravated by unfavorable labor conditions which continue to exist upon the lines of each and all the common carriers by railroads, subject to the Interstate Commerce Act, within the territory east of the Mississippi River, and because of the inability of said common carriers to properly and completely to serve the public in the transportation of coal, an emergency exists which requires immediate action;

It is ordered, that such common carriers by railroad in the aforesaid territory which serve coal mines, whether located upon the line of said railroad or customarily dependent upon it for car supply (herein termed coal-loading carriers) be, and they are hereby, authorized and directed for the period of 30 consecutive days, beginning with June 21, 1920, to furnish coal mines with open top cars suitable for the loading and transportation of coal (herein termed coal cars) in preference to any other use, supply, movement, distribution, exchange, interchange or return of such coal cars; provided, that such coal cars may be used in service moving in the direction of the mine or mines to be supplied, on the return movement, after the discharge of the coal lading thereof, upon a route not materially out of line and to points not beyond such mine or mines.

It is further ordered, that all common carriers by railroad within said territory other than coal-loading carriers, (herein termed non-coal-loading carriers) be, and they are thereby, authorized and directed during said period to deliver daily to a connecting coal-loading carrier or carriers, empty or loaded coal cars up to the maximum ability of each such non-coal-loading carrier to make such deliveries, and of each such connecting coal-loading carrier to receive and use the coal cars so delivered for the preferential purposes herein set forth.

It is further ordered, that all such common carriers by railroad within said territory be, and they are hereby, authorized and directed forthwith, and during said period, to discontinue the use of coal cars for the transportation of commodities otherwise than as hereinbefore specified (a) as to each coal-loading carrier, so long as any coal mine remain to be served by it with coal cars, and (b) as to each non-coal-loading carrier, so long as deliveries of any coal cars to con-

necting carriers may be due or remain to be performed under the terms of this order.

It is further ordered that all common carriers by railroad within the territory hereinbefore described be, and they are hereby authorized and directed, effective June 23rd, 1920, and until the further order of the commission, to place an embargo against the receipt of coal by any consignee, and against the placement of coal cars for consignment by any consignee, who shall fail or refuse to unload coal placed for unloading within 24 hours after such placement, until all coal so placed has been unloaded by such consignee, provided, that this authorization and direction shall not interfere with the movement of coal under permit to any coal pool or pools when authorized by any order heretofore or hereafter entered by the commission.

It is further ordered that all the rules, regulations and practices of said carriers with respect to car service are hereby suspended in so far only as conflicting with the directions hereby made; and that the authorizations and directions herein contained are to be considered as not conflicting with or superseding any Service Order heretofore entered by the commission.

And it is further ordered, that copies of this order be served upon the carriers hereinbefore described, and that notice of this order be given to the general public by depositing a copy thereof in the office of the Secretary of the Commission at Washington, D. C.

By the Commission:

(Seal.) GEORGE B. McGINTY, Secretary.

By Judge Sheppard: I next desire to introduce in evidence Order No. 49—Circular No. 49 of the Commission on Car Service of the American Railway Association, which is incorporated in the Bill of Exceptions in this cause now on file in this court, at pages 50 and 51, and which is as follows:

Circular CCS-49

To Railroads:

Service Order No. 7 of the Interstate Commerce Commission being designed to increase coal production by requiring preferential placement of cars for coal loading, Commission on Car Service Circular CCS-33 is hereby cancelled.

All carriers, both those east and west of the Mississippi River, should note carefully the aim of Service Order No. 7 to increase coal production in mining territory east of the Mississippi River.

Carriers west of the Mississippi River must note that the obligation of the roads east of the river with respect to the preferential placement of coal cars in coal mine service cannot be met without the simultaneous strict performance by all carriers west of the river of all outstanding orders designed to move coal cars into the east. The cancellation of CCS-33 should not be construed as indicative of any lack of necessity for the movement of coal cars from western line back to the east.

W. C. KENDALL, Chairman.

Defendant Rests.

Plaintiff's Evidence in Rebuttal.

FRANK TENNYSON:

Direct Examination.

By Mr. Tedrick:

My name is Frank Tennyson; live at Oxly, Missouri, and did in June, 1920, loading mine props for Rash. I began working for him about the first of June, and worked pretty steady up until about December. I don't have much of an idea how many cars Rash loaded out during the months of June, July and August, 1920. On an average we would load ten or fifteen cars a week. Sometimes we loaded from the trucks. Sometimes we held the cars there possibly two days for loading.

Q. Do you recall hearing Mr. Powers make any statement relative to why Mr. Stroud didn't get cars?

By Judge Sheppard: That is not rebuttal of anything; and if it is for the purpose of impeachment, Mr. Powers' attention wasn't called to any time or place.

By the Court: Objection overruled.

To which ruling of the court, the defendant, by counsel, did then and there duly object and except at the time.

Q. What was said, if anything, as to why Stroud didn't get cars, that was last year, in the hotel room, what did Powers say?

A. He said he didn't put out enough money, Stroud said that—Powers said that. Powers said Stroud did not put out enough money. Herbert Breese, Pete Wise, and I were present and heard him say that.

One time plaintiff was delayed in loading his car on account of not being able to get a crew. I was in the crew that wanted more money. That car was loaded out on the Monday following the Saturday that the crew wanted more money, loaded by a crew that he got somewhere else.

Cross Examination.

By Judge Sheppard:

Mr. Powers did not say that Stroud didn't pay his hands enough money to get the cars loaded, I understood it was for cars. He said if Stroud had put up more money, he would have gotten more cars. I don't remember just what was said immediately before that. We were up there in a room at the hotel, Messrs. Cope and Tedrick were there, too. I don't recollect what was said just before that or just afterwards. I don't recollect what all was said, they were talking of the case.

Q. What did they say, I would like for you to tell me just exactly what else was said up there?

A. I don't recollect now.

Q. You don't recollect a thing?

A. I recollect that.

Q. But nothing else?

A. I can't recall anything else.

HERBERT BREESE:

Direct Examination.

By Mr. Tedrick:

My name is Herbert Breese; I live at Oxly, Missouri. In June, July and August, 1920, I was loading for Rash there. I know the plaintiff who was at that time running a sawmill, putting out lumber. Rash loaded, oh, fifty or sixty cars a month, I don't know just how many. I worked steady for him. I was in that bunch that Stroud tried to get to load a car there and we refused to load on account of his refusal to pay enough. That car was loaded out on Monday following the Friday he tried to get us to load it.

I heard Mr. Powers say something along in June of last year, as to why Stroud couldn't get cars. He said if he had put up a litttle money, a litle more money, he might have got cars. That was in a room at the Grand Avenue Hotel.

Cross Examination.

By Judge Sheppard:

I didn't hear anybody ask Powers the question about it. He just up and said it, that's all I remember. We were talking about cars and things. I don't remember just the words which were said. Powers was not talking about paying his men more money. I know he wasn't talking about that. I don't remember what was said immediately before that. I know what he said; he said "If you had put up more money you might have got more cars." He could have been referring to some kind of a question that he had been asked, with reference to paying the men for loading the cars, but the talk wasn't running along that line. I don't remember just the particular words it was running on, though. One other thing they were talking about was Dicus' telegrams. They asked Clell where the telegrams were, and he said they would be shown up here; that's all I remember.

PETER A. WISE:

Direct Examination.

By Mr. Tedrick:

My name is P. A. Wise; I live at Oxly, and did in June, July and August, 1920. At that time I wasn't working; I had been in the mercantile business there, just shortly before that. I know the plaintiff. I don't know anything about the difficulty he had getting cars at Oxly, except what he told me, that is, that he had trouble getting cars. I never heard Mr. Clell Powers say anything about why Stroud couldn't get cars.

Plaintiff Rests.

Defendant Rests.

(And this was all the testimony).

The defendant here offered and requested the court to give to the jury a peremptory instruction in the nature of a demurrer to all the testimony; a copy of said peremptory instruction being in figures and words, as follows: (Omitting the caption.)

"Now at the close of all the evidence offered in this case the court instructs the jury that under the law and the evidence your verdict in this case must be for the defendant."

Which said peremptory instruction, so offered and requested to be given by the defendant, the court failed and refused to give to the jury; and to the action of the court in so failing and refusing to give said peremptory instruction to the jury, the defendant, by counsel, did then and there duly object and except at the time.

And thereupon, the plaintiff offered and requested the court to give to the jury the following instructions in this cause:

"*Instruction No.* 1.

"The court instructs the jury that if you believe and find from the evidence in this case, that the plaintiff, Roy Stroud, had, on the 12th day of June, 1920, a quantity of lumber placed at Oxly, Missouri, a station on defendant's railroad; that said lumber was deposited at the place provided by defendant for receiving such shipments; and that plaintiff on said date made application to defendant's agent at the said station for cars in which to ship his lumber; and that he tendered said lumber for shipment under the terms and conditions imposed by defendant; and if you further find that after the said cars were ordered by plaintiff and his application for same was filed and before said cars were delivered other shippers at the said station of Oxly, Missouri, engaged in the business of shipping lumber over defendant's railroad, ordered cars from defendant's agent at the station aforesaid, and that the defendant delivered cars to these shippers in preference to plaintiff and that the cars delivered to these other shippers were not to be used for shipping mine props or other mine material that had a preference under the Interstate Commerce Commission's rulings, offered in evidence; and if you further find that such preference, if any, resulted in a loss to plaintiff, then your verdict must be for plaintiff for such sum as you believe from the evidence he has been damaged, not to exceed $1,000.00.

"*Instruction No.* 2.

"The court instructs the jury that if you find for the

plaintiff, you should, in assessing his damage, take into consideration the reasonable market value of plaintiff's lumber at the date the cars ordered by plaintiff, on the 12th day of June, 1920, should have been delivered by the defendant, allowing defendant a reasonable time in which to make said delivery, and the reasonable market value of the lumber at the time defendant did deliver the cars so ordered, and your verdict should be for the difference between these two amounts not to exceed $1,000.00.

"Which said instruction, and each of them, so offered and requested to be given by the plaintiff, the court gave to the jury; and to the action of the court in so giving said instructions, and each of them, to the jury, the defendant, by counsel, did then and there duly object and except at the time.

"The defendant here offered and requested the court to give to the jury the following instructions in this cause:

"*No.* 4.

"The court instructs the jury that if you believe and find from the evidence in this case that on June 12th, 1920, plaintiff placed with agent of defendant at Oxly, Missouri, an order for two cars to be loaded with lumber to be shipped from Oxly, Missouri, to St. Louis, Missouri, and that afterwards, on the 22nd day of July, 1920, defendant furnished said cars to plaintiff at Oxly, and that plaintiff held said cars at Oxly for four days and failed to load same, and consented that said cars might be delivered to A. M. Rash for loading, which was done, then your verdict should be for the defendant.

"*No.* 5.

"The court instructs the jury that although you may believe and find from the evidence that the agent of defendant at Oxly furnished cars for loading lumber to other shippers than plaintiff after plaintiff had ordered cars and before furnishing cars to plaintiff, yet before you can find a verdict for the plaintiff you must further believe and find from the evidence that said cars so furnished said other shippers were furnished on orders made by said other shippers since the orders of plaintiff, or that said cars were not furnished

other shippers to facilitate the movement of coal as required by the Interstate Commerce Commission."

"Which said instructions, and each of them, so offered and requested to be given by the defendant, the court gave to the jury; and to the action of the court in so giving said instructions, and each of them, to the jury, the plaintiff, by counsel, did then and there duly object and except at the time.

And thereupon, after argument of counsel, the jury returned into court the following verdict in this cause: (Omitting caption.)

"We, the jury, in the above entitled cause, find the issues for the plaintiff, and assess his damages at the sum of one thousand dollars.

"Sam Tate, A. Y. Moore, Jack Bell, S. E. Cox, C. C. Estes, W. T. Tucker, John Ridlin, W. A. Chewning, E. E. Smelser."

And afterwards, to-wit, on the twenty-seventh day of March, A. D. 1922, the same being one of the days of the regular March term, 1922, of said court, and the same term at which the verdict of the jury was rendered in this cause, the court rendered and duly caused to be entered of record, its judgment herein; a copy of which said judgment is now on file in this court.

To which action of the court in rendering said judgment, the defendant, by counsel, did then and there duly object and except at the time.

And afterward, to-wit, on said thirtieth day of March, A. D. 1922, it being one of the days of the regular March term, 1922, of the Circuit Court within and for the County of Ripley and State of Missouri, and the same term at which the verdict of the jury was returned in this cause, and the judgment of the court rendered in this cause, and within four days of the date on which the verdict of the jury was returned in this cause, the defendant filed in this court its motion for a new trial of this cause; a copy of which said motion is as follows (omitting the caption):

"Motion for New Trial.

"Comes now the defendant in the above entitled cause, and moves the court to set aside the verdict of the jury heretofore rendered in this cause at this term of this court and

within four days prior to the filing of this motion, and to grant defendant a new trial herein, and as grounds therefor states:

"First: That the court erred in admitting incompetent evidence on the part of the plaintiff.

"Second: That the court erred in excluding competent evidence offered on behalf of the defendant.

"Third: Because the verdict of the jury was against the evidence and against the weight of the evidence produced at the trial.

"Fourth: Because during the guaranty period under the Transportation Act of 1920, the control of the furnishing of cars continued under Federal control, and that during such period suits could not be brought for the failure to furnish cars, or the discrimination in so doing or refusing to do so, under any state law.

"Fifth: Because the court erred in giving to the jury instructions Nos. 1 and 2 on behalf of plaintiff, and in refusing defendant's instruction No. 2-A."

Which said motion for a new trial was by the court on the same day overruled, by its order duly entered of record. To which action of the court in overruling defendant's motion for a new trial of this cause the defendant, by counsel, did then and there duly object and except at the time.

And afterward, to-wit, on the same day, the defendant filed in said court its motion in arrest of judgment in this cause, which said motion is as follows: (Omitting caption and signatures.)

"*Motion in Arrest of Judgment.*

"Comes now the defendant in the above entitled cause, and during the same term at which the cause was tried, and within four days after the verdict was rendered, and files its motion in arrest of judgment, and as grounds therefor states:

"First: Because upon the whole record the judgment is erroneous.

"Second: Because the court had no authority to render any judgment on the verdict in this case for any alleged discrimination in the failure to furnish cars to the plaintiff by the defendant under the laws of the State of Missouri, for the reason that at the time the alleged discrimination happened in this case, the defendant was controlled by the Fed-

eral law as to the furnishing of cars, and not by the State laws.

"Third: Because the court had no authority under the State laws to treble the damages assessed by the jury in this case, for the reason that the Federal laws controlled the whole subject of furnishing cars during the period of Federal control, and that the Transportation Act, 1920, continued said act in force during the guaranty period and thereby suspended all penalties under State laws during said guaranty period, which said period included the time when plaintiff's alleged cause of action accrued."

And afterwards, to-wit, on the same day, it being March 30, 1922, the court by its order duly entered of record, overruled said motion in arrest of judgment by its order duly entered of record; to which action of the court in overruling its said motion in arrest of judgment, defendant, by counsel, did then and there duly object and except at the time.

And afterwards, on the same day, defendant filed in said court its application and affidavit for an appeal of said cause to this court, which said application is as follows: (Omitting caption and signatures.)

"*Affidavit for Appeal.*

"Comes now J. C. Sheppard, attorney and agent for the defendant, who being duly sworn, upon his oath states that he is the agent of the defendant, and that the appeal taken herein is not made for vexation and delay, but because he verily believes the appellant is aggrieved by the verdict of the jury and the judgment of the court."

And thereafter, on the same day, said court allowed appellant an appeal in said cause to this court, by an order duly entered of record, which said order allowed defendant time to file an appeal bond, and file its Bill of Exceptions; and that on September 7, 1922, within the time allowed by the court and by law for filing its Bill of Exceptions, appellant duly filed same in the office of the Clerk of the Circuit Court of Ripley County, by an order duly entered of record; said Bill of Exceptions having first been duly signed, sealed, allowed by Hon. Almon Ing, Judge of the Circuit Court of Ripley County, Missouri.

Respectfully submitted,
JAS. F. GREEN, and
J. C. SHEPPARD,
Attorneys for Appellant.

STATEMENT.

The petition of the plaintiff is based on Section 9985 of the Revised Statutes of Missouri of 1919, and alleges in substance that respondent had about twenty thousand feet of lumber along side the railroad track of appellant, which he desired to ship over appellant's railroad to St. Louis, Missouri. That on the 12th day of June, 1920, he ordered two cars from the agent of appellant to be placed for him for the purpose of loading and shipping said lumber. The petition further alleges that appellant discriminated against him and furished other shippers, who desired to ship lumber from the same station on this road, with cars for that purpose on orders made by other shippers after the order made by respondent on June 12th. That said orders which were made by other shippers subsequent to the order of the two cars made by respondent were filled before respondnt's order, thereby discriminating against respondent.

The petition further alleges that owing to the delay in furnishing the cars for the shipment of respondent's lumber, he was damaged in the sum of One Thousand Dollars, ($1,000.00) by reason of a drop in the market.

The answer of appellant admits its corporate existence, and admits that respondent had some lumber placed ready for shipment at Oxly, Missouri, but denies he had as much as twenty thousand feet, and further denies that the plaintiff tendered said lumber for transportation under the terms by which that kind of freight was handled by defendant, and denies that plaintiff offered to pay to defendant the customary charges for the transportation of said lumber.

The answer further alleges that the order for the two cars made June 12th, 1920, by respondent, was filled by placing said cars ready for loading, but that respondent refused to load the same for a period of four days, and then voluntarily permitted one A. M. Rash to load said cars and ship the same. The answer further denies any discrimination against the respondent.

For another and further defense to the action of respondent, appellant states that it operates two lines of railroad from Oxly, Missouri, to St. Louis, Missouri; one of said routes being entirely within the State of Missouri; the other crossing the Mississippi River at Thebes, and going up to St. Louis through the State of Illinois; and that the usual and regular way of routing lumber from Oxly, Missouri, to St.

Louis, Missouri, would be over the latter route, and was an interstate shipment, and that, therefore, the said Section 9985 of the Revised Statutes of Missouri of 1919 does not apply to this case.

The evidence in the case on the part of the respondent tended to show that he had placed on the right of way, on or about the 12th day of June, 1920, about thirty-one thousand feet of lumber, that he sold a car load of this lumber to one Arnold, amounting to about eleven thousand feet, according to the testimony of respondent. Arnold himself testified that this car load contained eleven thousand, six hundred and fifty-two feet. Respondent further testified that he sold other quantities of lumber from this pile to farmers, but was unable to state how much. On June 12th, 1920, respondent signed a written order for two cars, and delivered the same to the agent of appellant at Oxly, Missouri. He testified that this order for these two cars was never filled; that no cars were ever placed by appellant for the purpose of loading this lumber until August 19 and 23, 1920. He admits, however, that he sold one car load to Arnold, and Arnold testified that this car was loaded on or about August 23. Respondent testified that he received $60.00 a thousand, the market price, for this car from Arnold who had advanced him $600.00 on the car at a prior date. In this he was corroborated by Arnold. This disposed of one of the two cars ordered on June 12. The other car was furnished him four days previous to that time, viz., August 19, in which he shipped car material. Respondent did not know how many thousand feet this car contained, but it was a large car, and he received $40.00 a thousand for its contents; and that car material did not come out of the 31,000 feet spoken of as being piled by the side of the track. The car shipped on August 23 came out of that pile. Respondent further testified that the Rash Timber Company was loading out a considerable number of cars through June, July and August, 1920, but was unable to state when the cars which the Rash people shipped out were ordered; yet he undertakes to say that they were ordered after his order was placed and filled before. When cross examined about this, however, it is disclosed that he did not know anything about when the Rash people's orders were placed. He finally stated that the order book showed what happened. Later on in the trial he offered in evidence the order book, which will be found in the abstract of this record opposite page 17.

The testimony on behalf of the appellant shows that respondent ordered these two cars on the 12th day of June; that there was quite a car shortage at that time, and in obedience to the Interstate Commerce orders, cars suitable for loading coal were required to be moved to the coal mines; that mine props and other coal mining material had the preference over other commodities. That these two cars were placed at Oxly for respondent on the 22nd day of July, 1920, and that he was unable to procure loaders and finally, on the 26th day of July, 1920, agreed that Rash might load these two cars out, which he did. This is testified to by Baird, the conductor, and Rash, and Crosson, the brakeman, and the station agent. Stroud denies this. The evidence further shows that under the order of the Interstate Commerce Commission, cars both east and west of the Mississippi River were required at that time to go to the coal mining districts and a preference was given by these orders to mine props and other coal mining material.

The order book referred to by respondent in his testimony, and by which he said he learned of the orders, was offered in evidence by respondent, and this book shows that the two cars were first placed for Stroud on July 22nd, and later, on July 26th, were given to Rash because Stroud could not load; that two cars were also furnished Stroud on August 19th. This book fails to show any order made by Rash after June 12, and filled prior to July 22nd.

Points and Authorities.

I.

The court erred in refusing to give to the jury the instruction in the nature of a demurrer to the evidence, requested by appellant at the close of all the evidence, there being no evidence to show any unlawful or unreasonable discrimination against respondent, in the matter of furnishing cars for the shipment of his lumber.

II.

The court erred in giving to the jury instruction No. 1 at the request of respondent.

(a) It failed to require the jury to find that if there were orders filed by other shippers subsequent to June 12, 1920, and filled prior to respondent's order, that the shipments made in said cars were intrastate, thereby making the Missouri Statute inapplicable.

Sec. 9985 R. S. 1919.
Sec. 9993 R. S., 1919.
Steele v. Railroad, 165 Mo. App. 311.
Chicago, Rock Island & Pacific Ry. Co. v. Farmers Elevator Co. 226 U. S. 426; 33 Sup. Ct. Rep. 174.
Southern Railway Company v. Reid, 222 U. S. 424, 32 Sup. Ct. Rep. 140.
Erie Railroad Company v. People of the State of New York, 233 U. S. 671, 34 Sup. Ct. Rep. 756.
People v. Commission, 135 N. E. 197.

(b.) Instruction No. 1 permitted the jury to find for respondent even though they believed that he was furnished cars on July 22, 1920; as they might have found there was discrimination prior to that date. For this reason it is in conflict with appellant's instructon No. 4, and it cannot be known which instruction the jury followed, and the error is not cured by the giving of instruction No. 4.

Murdock v. Dunham, 206 S. W. 915, and cases cited.

(c.) Instruction No. 1 fails to require the jury to find that there was any *undue or unreasonable preference.*

Sec. 9985 R. S. 1919.

III.

The court erred in giving to the jury instruction No. 2, at the request of respondent.

(a.) In laying down the measure of damages it fails to tell the jury what is meant by "market value", whether it is that value at the point of shipment or the point of destination.

(b.) It limits the amount of recovery to the amount of "plaintiff's lumber"; but fails to tell the jury just what lumber is referred to; whether it was all of plaintiff's lumber before any of it was shipped, whether it was the remainder of the lumber after the carload of car material was shipped on August 19, or whether it was the remainder after both that car and the car of inch lumber shipped on August 23, were shipped.

(c.) This instruction should have told the jury that respondent's damage was the difference between what he received for the two cars shipped on August 19 and 23, and what he would have received had these cars been furnished within a reasonable time after June 12.

(d.) Instruction No. 2, failed to tell the jury that the market price should have been at the destination which was the controlling market.

Georgia Railway Co. vs. Live Stock Co., 92 S. W. 609.

IV.

The court should have granted appellant a new trial on the ground that the verdict is not supported by the evidence. Respondent ordered only two cars June 12, about which complaint is made. He received one car on August 19, loaded it with car material and sold it for $40 a thousand. There is no showing how much this car contained, but with a maximum load, shown by the evidence to be 20,000 feet, he would have lost only $400. He received another car on August 23, loaded it with lumber for which he received the full price, $60 a

thousand, and on which he lost nothing. So that, a verdict for more than $400 cannot be supported by the evidence in this case, and this amount is speculative absent a showing of the contents of the car shipped on August 19.

Argument.

This is a suit for treble damages for undue and unreasonable discrimination in the furnishing of cars for the shipment of lumber based on Sec. 9985, R. S. 1919. The petition alleges that respondent ordered from the agent of appellant at Oxly, Missouri, on June 12, 1920, two cars for the shipment of lumber from that point to the city of St. Louis, Missouri. Afterwards other shippers ordered cars from appellant to be shipped from the same point, and that the cars subsequently ordered were furnished the other shippers prior to the time the two cars were furnished respondent, resulting in respondent's being discriminated against.

Respondent does not claim that he was discriminated against as to any other order for cars; but grounds his recovery solely on the failure of appellant to furnish to him the two cars ordered on June 12, 1920.

I.

Taking respondent's testimony as true, and throwing aside all of appellant's testimony as to the date the cars were furnished, the demurrer to the testimony at the close of all of the evidence should have been sustained.

Respondent's testimony shows that he ordered only two cars, those ordered on June 12, 1920; that one car was furnished him on August 23, 1920, which he loaded with lumber and sold to the witness, Arnold, for the sum of $60 per thousand, that being the market price of such lumber at that time, and the price fixed in the contract he had with Arnold prior to the time he ordered the car. His testimony shows that another car was furnished him on August 19, 1920, that he loaded it with car material, and sold it for the sum of $40 per thousand. The testimony fails to show how many feet of car material was loaded in this car. There being no loss occasioned by the shipment of lumber which was sold to Arnold, and there being no testimony showing the loss which was occasioned on the car of material, there is nothing upon which the jury could base a verdict for respondent; and the verdict rendered is wholly speculative. The burden being on respondent to show the amount of his damages, and he having

failed to do so; appellant's demurrer at the close of all of the evidence should have been sustained.

II.

(a.) Instruction No. 1 tells the jury that if other shippers ordered cars subsequent to the time respondent ordered cars, and that these shippers were furnished cars prior to the time respondent was, that unless they find these cars furnished other shippers were to be used for shipping mine props or other mine material which had a preference under the rulings of the Interstate Commerce Commission, they should find for the plaintiff.

This leaves out of consideration entirely the question of whether or not the cars furnished other shippers were to be used in interstate commerce. It is appellant's contention that if any of such cars were so used, then respondent has no cause of action under the statute of Missouri, and his cause of action, if any he had, was under the Act to Regulate Commerce, which provides in Section 1 thereof, that the Interstate Commerce Commission shall have jurisdiction over the questions of the supply and distribution of cars; and Section 3 as amended February 28, 1920, provides:

> "That it shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

The cases cited under Points and Authorities II, (a), hold that:

> "Where from the particular nature of certain subjects, the State may exert authority until Congress acts, under the assumption that Congress, by inaction, has tacitly authorized it to do so, action by Congress destroys the possibility of such assumption, since such action, when exerted, covers the whole field, and renders the State impotent to deal with a subject over which it had no inherent, but only permissive power." Chicago, Rock Island and Pacific Railway Company v.

Hardwick Farmers Elevator Company, 226 U. S. 426, 33 Sup. Ct. Rep. 174, 176.

The burden of showing that the cars furnished other shippers before they were to respondent, which said cars had been ordered after respondent filed his order for cars, had not been used in interstate commerce. This respondent failed to do; and the instruction failed to require the jury to find this as a fact precedent to respondent's recovery.

(b.) Respondent's evidence by himself alone showed that no cars were furnished him between June 12, 1920, and August 19, 1920; appellant's evidence by four witnesses, shows that two cars were furnished him July 22, 1920. As the latter date was prior to the fall in the market price of lumber, respondent was not damaged if he cars were furnished him on that date, and he permitted another shipper to use them.

Respondent's Instruction No. 1, permits him to recover notwithstanding the jury may find from the evidence that the two cars were furnished him on July 22, because the instruction permits them to find that he was discriminated against prior to that date. If such cars were furnished on that date, and respondent had loaded and shipped them at that time, he would not have been damaged as the price of lumber had not gone down on that date. Section 9990 R. S. 1919, fixing the penalty for discrimination provides that "such common carrier shall be liable to the person or persons injured thereby for three times the amount of damages sustained in consequence of the violation of the provisions of said section, "referring to Sec. 8895 and others. So that, there can be no recovery, unless he is injured; and unless he failed to receive the market price of his lumber, he is not injured. In other words, before respondent can recover under the statute, for the penalty, or otherwise, he must show that he has been injured by reason of the discrimination, and the amount of his damages.

In addition to this, that part of instruction No. 1 is in direct conflict with instruction No. 4 given at the request of appellant, which tells the jury that if they find from the evidence that cars were furnished respondent on July 22, 1920, and that respondent failed to load them, but consented that they might be diverted to A. M. Rash, then respondent could not recover. So, we have instruction No. 1, telling the jury they may find for respondent if they find that he was discriminated against at any time, and instruction No. 4, telling them that unless such discrimination occurred subsequent to July 22, 1920, there can be no recovery by respondent.

Instruction No. 4 correctly declares the law as applied to the facts in this case, for the reason that respondent's testimony shows that the price of lumber had not fallen from the time he contracted to sell this lumber up to July 22, 1920. So that, if the cars were furnished on that date, respondent could not have been damaged as he would have received the contract price for his lumber.

It cannot be said that this error in instruction No. 1 is cured by appellant's instruction No. 4, because "an instruction which omits a necessary element to the maintenance of a plaintiff's case and directs a verdict is not aided by a correct one for the defendant, for they are antagonistic, and it cannot be known which the jury followed."

Murdock v. Dunham, 206 S. W. 915, and cases cited.

(c.) Section 9985 R. S. 1919, provides:

> "It shall be unlawful for any such common carrier to make or give any *undue or unreasonable* preference or advantage to any particular person, company or firm, corporation or locality, in the transportation of goods, wares and merchandise of any character," etc.

This instruction No. 1 fails to require the jury to find that the discrimination was either *undue* or *unreasonable*. It merely requires them to find that respondent was discriminated against, and tells them that if there was such discrimination, then appellant is liable in damages, regardless of whether or not the discrimination was reasonable, necessary, or what not.

III.

(a.) Instruction No. 2 given at the request of respondent tells the jury that the measure of damages is the difference between the "market value" of the lumber on June 12, 1920, and the "market value" at the time the cars were delivered, allowing a reasonable time after June 12, 1920, for their delivery. The instruction does not tell them where the "market" was, whether Oxly, Naylor, St. Louis, Chicago, or anywhere else. There is no testimony as to where respondent intended to ship the remainder of the lumber. It authorized the jury to speculate as to these matters without any guide, whatever.

(b.) Instruction No. 2 tells the jury that in assessing

respondent's damages, they should take into consideration the reasonable market value of "plaintiff's lumber". Just what is meant by the expression in quotation marks is not clear. Did it mean the entire pile of respondent's lumber before any was shipped? Did it mean the remainder after the carload of car material was shipped on August 19? Did it mean the remainder after the two cars were shipped on August 19 and 23, respectively? Under this instruction the jury could figure respondent's damages on the basis of the entire amount of lumber remaining after the shipment of these two cars, in spite of the fact that respondent's evidence shows that he ordered only two cars, and that the cause of action is based upon the discrimination in furnishing two cars. Of course, when the two cars were furnished, respondent's damages ceased, and he could recover nothing more than he lost by reason of the failure to furnish the two cars, regardless of how much lumber was left in the pile near the track. It is evident from the amount of the verdict that the jury were led to believe that they had a right to assess damages on the entire amount of lumber remaining after the shipment in the two cars on August 19 and 23; and did so figure it, which would have amounted to $1,200; but subsequent to August 23, 1920, respondent sold some of the remainder at prices which brought him the sum of $195, leaving a balance of $1,005, for which the jury gave him a verdict for $1,000.

(c.) Instruction No. 2, should have told the jury that respondent could recover only the difference between what he received for the timber shipped on August 19 and 23, and what he would have received for these two carloads had the cars been furnished at the proper time. This is the proper measure of his damages, and the instruction is erroneous in not limiting his recovery to this amount.

IV.

Respondent pleads that appellant discriminated against him in the furnishing of *two* cars and two only. The statute under which he seeks a recovery is penal, providing for the trebling of the amount of damages fixed in the verdict of the jury. Such being the case, it must be strictly construed; and the courts should require respondent to bring his case, by his evidence, strictly within the statute, as well as strictly within his pleadings. Therefore, respondent cannot recover for any damages resulting from discrimination as to the furnishing of any cars other than the two mentioned in his petition.

Respondent had a contract with one Arnold by which he

was to sell to Arnold a carload of lumber for $60 a thousand, and upon which the latter had already advanced him $600. That carload of lumber was shipped out on August 23, 1920; and respondent received the contract price. Therefore, he sustained no damages on account of discrimination as to the furnishing of that car.

The other carload of car timbers was shipped out on August 19, 1920. There is no evidence as to how many thousand feet that car contained; but there is evidence that the largest cars will contain a maximum of not more than 20,000 feet. This carload brought respondent $40 a thousand feet. How much he received for this carload is a matter of speculation; but in any event, it could not amount to more than $400.

It cannot be claimed by respondent that had he received the two cars promptly he could have shipped all of his lumber and received $60 a thousand therefor, because he testified that the carload of car material shipped on August 19, 1920, did not come out of the lumber piled near the track. He further testified that he had about 21,000 feet left near the track, after he had shipped the two carloads on August 19, and 23, respectively. So that it is shown conclusively by his own testimony that he could not have shipped all of the lumber, including the car material, in two cars. In other words, respondent ordered two cars, shipped two cars, and had 21,000 feet left. His loss could not possibly have been more than $400 under the most favorable view of respondent's evidence, and it is clear that he is now attempting to make appellant pay for the slump in lumber prices.

In view of the many errors pointed out above, it is submitted that this case should be reversed.

Respectfully submitted,

JAMES F. GREEN and
J. C. SHEPPARD,
Attorneys for Appellant.

OPINION OF SPRINGFIELD COURT OF APPEALS HANDED DOWN JANUARY 29, 1923.

In the Springfield Court of Appeals, October Term, 1922.

Roy Stroud, Respondent,
Vs. No. 3245.
Missouri Pacific Railroad Company, Appellant.

Appeal from the Circuit Court of Ripley County.

Hon. Almon Ing, Judge.

James F. Green, of St. Louis, and J. C. Sheppard, of Poplar Bluff, for appellant.
Cope & Tedrick, of Poplar Bluff, for respondents.

AFFIRMED:

BRADLEY, J.—This is an action based on Sections 9985 and 9990 R. S. 1919, to recover treble damages for alleged discrimination in furnishing cars to ship lumber. The cause was tried before the court and a jury, resulting in a verdict for plaintiff for $1,000, which was trebled in accordance with Section 9990 and judgment rendered accordingly. Defendant filed motion for a new trial and in arrest. These were overruled, and it appealed.

This cause was here on a former appeal, 236 S. W. 891, and for a statement we refer to the cause as reported. The facts are substantially the same as appeared on the former appeal, except the question of an interstate shipment is not involved in the present appeal as it was in the former appeal. We will state such additional facts as may be necessary in disposing of the assignments of error.

Defendant contends that error was committed (1) in refusing its instruction in the nature of a demurrer; (2) in giving plaintiff's instruction number 1; (3) in the instruction on the measure of damages, and (4) that the verdict is excessive.

(1.) The first assignment is based on the proposition that there is no substantial evidence tending to show any unlawful or unreasonable discrimination. As stated, the evidence at the second trial was substantially the same as that of the first, and on the former appeal we ruled that there was sufficient evidence to take the cause to the jury, and we adhere to that ruling.

(2.) Plaintiff's instruction number 1 is as follows: "The court instructs the jury that if you believe and find from the evidence in this case, that the plaintiff, Roy Stroud, had, on the 12th day of June, 1920, a quantity of lumber placed at Oxly, Missouri, a station on defendant's railroad; that said lumber was deposited at the place provided by defendant for receiving such shipments; and that plaintiff on said date made application to defendant's agent at the said station for cars in which to ship his lumber; and that he tendered said lumber for shipment under the terms and conditions imposed by defendant; and if you further find that after the said cars were ordered by plaintiff and his application for same was filed and before said cars were delivered other shippers at the said station of Oxly, Missouri, engaged in the business of shipping lumber over defendant's railroad, ordered cars from defendant's agent at the station aforesaid, and that the defendant delivered cars to these shippers in preference to plaintiff and that the cars delivered to these other shippers were not to be used for shipping mine props or other mine material that had a preference under the Interstate Commerce Commission's ruling, offered in evidence; and if you further find that such preference, if any, resulted in a loss to plaintiff, then your verdict must be for plaintiff for such sum as you believe from the evidence he has been damaged, not to exceed $1,000."

Defendant challenges instruction number 1 on the grounds (a) that it failed to require the jury to find before plaintiff could recover that cars delivered to other shippers in apparent discrimination against plaintiff were for *intrastate* shipments; (b) that instruction number 1 is in conflict with defendant's instruction number 4; (c) that instruction number 1 fails to require the jury to find that there was any undue or unreasonable preference. (a.) Defendant contends that even though it discriminated against plaintiff in furnishing cars that it is not liable if those whom it favored used the cars, furnished in discrimination against plaintiff, for *interstate* shipments. As stated, *supra*, plaintiff's cause is based on Sections 9985 and 9990 of our 1919 Revised Statutes. Section 9993, R. S. 1919, provides that all provisions of Section 9980 to 9994 shall be held to apply to any shipment made from any point within the State to any point within the State, whether the transportation of the same shall be wholly within the State or partly within this State and adjoining State or States. Our statute is applicable except in interstate shipments. Defendant's learned counsel does not cite any authority sustaining

his contention and we find none. If a railroad company could with impunity furnish an interstate shipper cars in discrimination against an intrastate shipper then it would take no stretch of the imagination to see how utterly helpless, and at what great disadvantage an intrastate shipper would be. (b.) Defendant says that plaintiff's instruction number 1 is in conflict with its instruction number 4. Instruction 4 is as follows: "The court instructs the jury that if you believe and find from the evidence in this case, that on June 12th, 1920, plaintiff placed with the agent of defendant at Oxly, Missouri, an order for two cars to be loaded with lumber to be shipped from Oxly, Missouri, to St. Louis, Missouri, and that afterwards, on the 22nd day of July, 1920, defendant furnished said cars to plaintiff at Oxly and that plaintiff held said cars at Oxly for four days and failed to load same, and consented that said cars might be delivered to A. M. Rash for loading, which was done, then your verdict should be for the defendant." Defendant contends that instruction number 1 permitted the jury to find for plaintiff even though they believed that he was furnished cars on July 22, 1920, as they might have found there was discrimination prior to July 22nd. No date is mentioned in instruction 1 as the date July 22nd in instruction 4 is mentioned. By instruction 4 the jury was told plainly that if the cars were delivered, etc., on July 22nd then plaintiff could not recover. We do not think that the jury was mislead or confused, hence rule this point against defendant. (c.) Next defendant challenges instruction number 1 because it fails to require a finding that the discrimination was *undue or unreasonable*. The statute, Sec. 9985, R. S. 1919, uses the words *undue or unreasonable*, but if defendant discriminated against plaintiff as his evidence tended to show then such discrimination was as a matter of law undue and unreasonable, and under the facts here, it was not necessary to submit that issue.

(3.) Plaintiff's instruction on the measure of damages is as follows: "The court instructs the jury that if you find for the plaintiff, you should, in assessing his damage, take into consideration the reasonable market value of plaintiff's lumber at the date the cars ordered by plaintiff, on the 12th day of June, 1920, should have been delivered by the defendant, allowing defendant a reasonable time in which to make said delivery, and the reasonable market value of the lumber at the time defendant did deliver the cars so ordered, and your verdict should be for the difference between these two amounts not to exceed $1,000." We think that this instruc-

tion is proper and is not subject to the criticism leveled against it.

(4.) Is the verdict excessive? Defendant by a process of elimination undertakes to demonstrate that plaintiff could not have lost over $400. We think that defendant's counsel is in error in his analysis of the evidence. It is not necessary to set out the evidence in ruling on this assignment. The trial court heard the evidence and told the jury in effect that if they believed plaintiff's evidence they might find for him in a sum not exceeding $1,000. We think this is plain when the evidence is analyzed correctly.

The judgment below should be affirmed and it is so ordered. Cox, P. J. and Farrington, J. concur.

JOHN H. BRADLEY, Judge.

MOTION FOR RE-HEARING.

In the Springfield Court of Appeals, October Term, 1922.

Roy Stroud, Respondent,
Vs. No. 3245.
Missouri Pacific Railroad Company,
a Corporation, Appellant.

Appeal from the Circuit Court of Ripley County.

Hon. Almon Ing, Judge.

APPELLANT'S MOTION FOR RE-HEARING.

Comes now the appellant within ten days from the rendition of the opinion of this court in the above entitled cause, and moves the court to grant it a re-hearing herein and as grounds therefor states the following:

I.

Because the opinion and decision of this court is in conflict with Article 1, Section 8, Paragraph 3 of the Constitution of the United States of America and a violation of the Fourteenth Amendment of said Constitution, is in conflict with the policy and decisions of the Federal Courts as announced in C., R. I. & P. Ry. Co. v. Hardwick Elevator Co., 226 U. S. 426, and other similar decisions, and is in conflict with the policy of the Federal law as construed by the decisions of the Supreme Court of Missouri in Sells v. Ry. Co.,

266 Mo. 184, and other similar decisions, in the manner and for the reasons hereinafter more particularly stated, to-wit:

That Section 3 of the Act to Regulate Commerce (24 Stat. L, 380), provides, "that it shall be unlawful for any common carrier subject to the provisions of this act (1) to make or give any undue or unreasonable preference or advantage to any particular person, * * * or (2) to subject any particular person * * * to any undue or unreasonable prejudice or disadvantage in any respect whatsoever"; that by the terms of the foregoing statute, Congress has assumed jurisdiction over all discrimination in favor of as well as against interstate shipments, and has made it just as much a violation of the Federal statute to discriminate in favor of an interstate shipper as it is to discriminate against him; that plaintiff's instruction No. 1 is not confined to discrimination in favor of other interstate shippers, but permitted the jury to find for plaintiff if it believed that there was a discrimination in favor of either an intrastate or an interstate shipper to the prejudice of this intrastate shipper; and that the opinion of this court authorizes and sanctions recovery of treble damages in this suit based upon Sections 9985 and 9990, Revised Statutes of Missouri 1919, where there is a discrimination in the furnishing of equipment in favor of an interstate shipper to the prejudice of an intrastate shipper, notwithstanding the fact that Congress, through the aforesaid statute, has assumed jurisdiction over any and all discriminations in favor of interstate shippers.

Appellant's position is that it was necessary that the jury be required to find that the cars, if any, furnished other shippers in preference to him, were not used in interstate commerce. This court says that appellant has cited no authorities so holding. In this the court is in error. Appellant cited the following authorities:

Steele v. Railroad, 16 Mo. App. 311.
Chicago, R. I. & P. Ry. Co. v. Farmers Elevator Co., 226 U. S. 426, 33 Sup. St. Rep. 174.
Southern Railway Company v. Reid, 222 U. S. 244.

II.

This court has overlooked or failed to grasp the significance of the testimony as to the loss sustained by respondent as shown by his own evidence. There is no testimony whatever in this record warranting a verdict for respondent for more than $400.

SUGGESTIONS IN SUPPORT OF MOTION FOR RE-HEARING.

I.

As stated in the opinion respondent's cause of action is based upon Sections 9985 and 9990 of the Revised Statutes of Missouri, 1919. That part of Section 9993 of the Revised Statutes of Missouri, 1919, referred to in the opinion which provides that Sections 9980 to 9994 shall be held to apply to any shipment made from any point within the State to any point within the State, whether the transportation of the same shall be wholly within the State or partly within this State and adjoining State or States. This section, however, is void if it is construed to mean that even though in the transportation from a point in one State to a point in the same State, the goods move through another State for part of the journey, yet the movement is not interstate commerce. (Foster v. Western Union Telegraph Company, 205 Mo. App. 1, 219 S. W. 107).

This opinion states "Our statute is applicable except to an interstate shipment". If cars were furnished to shippers for shipments which were to move out of the State of Missouri, then those cars were furnished for interstate commerce, and the Missouri statute was not applicable, as conceded by the opinion in this case. This court has evidently overlooked the authorities cited on this point in appellant's original brief at page 76, and also some of the same authorities quoted from in appellant's reply brief at pages 2, 3 and 4.

This court has failed to consider that United States statute referred to in appellant's brief, when it says: "If the railroad company could with impunity furnish an interstate shipper cars in discrimination against an intrastate shipper, then it would take no stretch of the imagination to see how utterly helpless, and at what great disadvantage an intrastate shipper would be".

If this statement were correct, the conclusion would be, of course, inescapable; but the railroad company cannot with impunity furnish interstate shippers cars in discrimination against intrastate shippers. If it should do that, it would violate the Federal Statute, and the intrastate shipper would have a remedy under that statute, but not under the State statute sued on here. This fact seems to have been entirely overlooked by this court.

Either the State statute or the Federal Statute covers the discrimination in favor of the interstate shipper and against

the intrastate shipper. The courts have held over and over that both statutes cannot occupy the same field at the same time; that when Congress acts it covers the entire field to the exclusion of the State authority. If the railroad company furnished an interstate shipper cars in preference to an intrastate shipper, then it would be a violation of the United States statute and not the State statute, and the shipper's remedy would be under the former statute and not the latter. Perhaps this point was not made so clear in the original brief in this case as it should have been.

In other words, appellant says that before respondent was entitled to a recovery upon the cause of action pleaded herein, it was incumbent upon him to show that he was discriminated against in favor of other intrastate shippers, and not in favor of an interstate shipper; that before he could recover therein, the jury must be told that they must find that same fact; otherwise respondent's remedy was under the United States statute and not the Missouri statute.

For these reasons appellant respectfully insists that a rehearing should be granted herein.

II.

As to the amount of loss, if any, sustained by respondent, we think this court has overlooked the facts as disclosed by his own testimony, or has drawn an incorrect conclusion therefrom.

Respondent grounds his right of recovery upon the fact that appellant discriminated against him in the furnishing of only two cars which were ordered on June 12, 1920. According to his own testimony, he shipped out one carload on August 19, 1920, and another car load on August 23, 1920. Therefore, he did actually receive all the cars he ordered, but at a date later than he says he should have received them. On the former car load he received the contract price of the commodity shipped, that is, what was the price agreed upon before he ever ordered the car at all. Therefore he could not possibly have lost anything on account of any discrimination against him in the furnishing of cars. He received every cent he would have received had he shipped it out on the day he ordered the cars.

On the carload shipped on August 23, 1920, he received $40 a thousand feet for the lumber. There is no showing whatever as to how many feet of lumber were loaded in the car. Therefore, the verdict is based upon speculation wholly; nevertheless, the evidence does show that the maximum

amount of lumber which could have been loaded in that class of car was twenty thousand feet; the market price for the commodity on June 12, 1920, the day the cars were ordered was $60 a thousand feet; he received the price of $40 a thousand feet. Therefore, conceding that he loaded the car to capacity, he could not possible have lost more than $400 on that car. Therefore, we have this result: He ordered two cars to ship lumber, he received two cars, he lost $400 on one car, he lost nothing on the other. This result is reached not by a process of elimination as stated in this court's opinion, but is the result of the simplest sort of mathematics, about which there can be no two opinions arrived at under the record in this case.

There is no pleading that he could have shipped all the lumber he had on the yard in two cars if they had been timely furnished; nor is there any such evidence. He ordered only two, and received that number, and has been allowed to recover for a loss which occurred to the remainder of his lumber; which would have occurred even though the two cars ordered by him had been delivered to him on the same day they were ordered.

In the interest of justice appellant asks that this motion for re-hearing be sustained by this court.

ORDER SUSTAINING MOTION FOR RE-HEARING.

In the Springfield Court of Appeals, October Term, 1922.

Roy Stroud, Respondent,
Vs. No. 3245.
Missouri Pacific Railroad Company, Appellant.

Be It Remembered, That on the 13th day of February, 1923, the following order was entered of record:

Now, at this day, the court having fully considered the said appellant's motion for a re-hearing of this cause doth sustain the same. Case set down for hearing on the March docket.

OPINION OF SPRINGFIELD COURT OF APPEALS, HANDED DOWN JUNE 26, 1923.

In the Springfield Court of Appeals, March Term, 1923.

Roy Stroud, Respondent,
Vs. No. 3245.
Missouri Pacific Railroad Company, Appellant.

Appeal from the Circuit Court of Ripley County.
Hon. Almon Ing, Judge.

James F. Green, of St. Louis, and J. C. Sheppard, of Poplar Bluff, for appellant.
Cope & Tedrick, of Poplar Bluff, for Respondent.

AFFIRMED ON CONDITION:

BRADLEY, J.—This is an action based on Sections 9985 and 9990 R. S. 1919, to recover treble damages for alleged undue or unreasonable preference in furnishing cars to ship lumber. The cause was tried before the court and a jury, resulting in a verdict for plaintiff for $1,000, which was trebled in accordance with Section 9990 and judgment rendered accordingly. Defendant filed motions for a new trial and in arrest. These were overruled, and it appealed.

This cause was here on a former appeal, Stroud v. Mo. Pac., 210 Mo. Appl. 311, 236 S. W. 891, and for a statement we refer to the cause as reported as the facts are substantially the same. An assignment here, however, relating to interstate commerce was not specially decided on the former appeal.

Defendant contends that error was committed (1) in refusing its instruction in the nature of a demurrer; (2) in giving plaintiff's instruction number 1; (3) in the instruction on the measure of damages; and (4) that the verdict is excessive.

The first assignment is based on the proposition that there is no substantial evidence tending to show any undue or unreasonable preference. As stated, the evidence at the second trial was substantially the same as that of the first, and on the former appeal we ruled that there was sufficient evidence to take the cause to the jury, and we adhere to that ruling.

Plaintiff's instruction number 1 is as follows: "The court instructs the jury that if you believe and find from the evidence in this case that the plaintiff, Roy Stroud, had, on

the 12th day of June, 1920, a quantity of lumber placed at Oxly, Missouri, a station on defendant's railroad; that said lumber was deposited at the place provided by defendant for receiving such shipments; and that plaintiff on said date made application to defendant's agent at the said station for cars in which to ship his lumber; and that he tendered said lumber for shipment under the terms and conditions imposed by defendant; and if you further find that after the said cars were ordered by plaintiff and his application for same was filed and before said cars were delivered other shippers at the said station of Oxly, Missouri, engaged in the business of shipping lumber over defendant's railroad, ordered cars from defendant's railroad, ordered cars from defendant's agent at the station aforesaid, and that the defendant delivered cars to these shippers in preference to plaintiff and that the cars delivered to these other shippers were not to be used for shipping mine props or other mine material that had a preference under the Interstate Commerce Commission's ruling, offered in evidence; and if you further find that such preference, if any, resulted in a loss to plaintiff, then your verdict must be for plaintiff for such sum as you believe from the evidence he has been damaged, not to exceed $1,000."

Defendant challenges instruction number 1 on the grounds (a) that it failed to require the jury to find, before plaintiff could recover, that cars delivered to other shippers in discrimination against plaintiff were for *intrastate* shipments; (b) that instruction number 1 is in conflict with defendant's instruction number 4; (c) that instruction 1 fails to require the jury to find that there was any undue or unreasonable preference.

Defendant contends in effect that even though it subjected plaintiff to undue or unreasonable prejudice or disadvantage in failing to furnish cars, that it is not liable, if those whom it favored used the cars, furnished in discrimination against plaintiff, for interstate shipments; and that instruction number 1 should have required a finding on that question. We granted a re-hearing in this cause, and when it was re-argued, it was urged that a shipper had no redress under the state statute when discriminated against, if such discrimination was in favor of an interstate shipper. This question was one of the grounds which caused us to grant a re-hearing. The question is: If an *interstate* shipper is favored over an *intrastate* shipper, has the *intrastate* shipper any remedy under the State statutes? On the authority of Alexander v. Railroad, 282 Mo. 236, 221 S. W. 712, we answer the question in the affirmative. In that case our Supreme Court *en banc*

had under consideration the same sections of our statutes as are involved here. In the Alexander case, plaintiff sued to recover treble damages and attorney's fee for refusing to set a car of coal on a switch adjacent to plaintiff's coal yard. The defendant contended that the petition did not state a cause of action in that it was not alleged that the car of coal was an *intrastate* shipment. It was held that such an allegation was not necessary; that such was a matter of defense. Defendant in the case at bar does not specifically plead that the alleged favored shipments were interstate, but we think the point is sufficiently made. The court in the Alexander case said: "Neither do we think that appellant's contention that 'before appellant can be held liable it must be shown that it gave undue or unreasonable preference' to some person other than respondent, is well taken. If appellant's construction of this statute were sustained, a common carrier could refuse to deliver shipment to one consignee, and yet if it gave no special preference to other consignees it could not be held to have violated the law. We do not understand that law to mean that a common carrier may, without just reason, ruin a man's business by refusing to serve him, and then escape liability therefor merely because the injured one cannot prove that the carrier has shown an undue preference toward another. Section 3184, *supra,* does, it is true, forbid a common carrier 'to give any undue or unreasonable preference or advantage to any particular person', but with equal clearness it also forbids a common carrier 'to subject any particular person to any undue or unreasonable prejudice or disadvantage'. Either act is an offense against the law. Both might be committed at the same time, and, conceivably in the same transaction, but the offenses are not necessarily *concomitant,* nor in any sense *inter-dependent. It is not necessary for the carrier to violate the law twice in order to be held liable once.*" (Italics ours).

To give one shipper "undue or unreasonable preference or advantage" is bound to result in "undue or unreasonable prejudice or disadvantage" to some other shipper, because there could be no *advantage* if only *one* shipper were involved. Plaintiff not only charged that another shipper was favored over him, but he also charges in effect "undue or unreasonable prejudice or disadvantage". In fact it seems to us that a charge of "undue or unreasonable preference or advantage" is equivalent to a charge of "undue or unreasonable prejudice or disadvantage." The converse, however, would not always be true, because a carrier could refuse to serve a shipper, and the refusal would work a great hardship, although no other

shipper was favored. The Alexander case holds that either act, "undue or unreasonable preference or advantage", or "undue or unreasonable prejudice or disadvantage", is an offense against the law. "It is not necessary for the carrier to violate the law twice in order to be held liable once", as said in the Alexander case. As we read that case it was not especially necessary for plaintiff in the case at bar to show that other shippers were *favored.* It was sufficient for him to show that he was subjected to "undue or unreasonable prejudice or disadvantage." In establishing the latter fact, however, plaintiff's evidence established the former. But his *burden* was not the establishment of the fact that some other shipper had been given "undue or unreasonable preference or advantage", but that he had been subjected to "undue or unreasonable prejudice or disadvantage". Instruction number 1 is framed with the idea of *preference* to other shippers, but the establishment of that fact also established in this case the fact that plaintiff was subjected to undue or unreasonable prejudice or disadvanage. It is our conclusion that the character of the shipment or shipments, whether intrastate or interstate, that were favored over plaintiff, is not of consequence, and that if an *intrastate* shipper is subjected to "undue or unreasonable prejudice or disadvantage", from favoring an *interstate* shipper, that such *intrastate* shipper can recover under the State statute. It was not necessary, therefore, for plaintiff's instruction to require a finding that the shipments alleged to have been favored over plaintiff were *intrastate.*

Defendant says that plaintiff's instruction number 1 is in conflict with its instruction number 4. Instruction 4 is as follows: "The court instructs the jury that if you believe and find from the evidence in this case that on June 12th, 1920, plaintiff placed with the agent of defendant at Oxly, Missouri, an order for two cars to be loaded with lumber to be shipped from Oxly, Missouri, to St. Louis, Missouri, and that afterwards, on the 22nd day of July, 1920, defendant furnished said cars to plaintiff at Oxley, and that plaintiff held said cars at Oxly for four days and failed to load same, and consented that said cars might be delivered to A. M. Rash for loading, which was done, then your verdict should be for the defendant." Defendant contends that instruction number 1 permitted the jury to find for plaintiff even though they believed that he was furnished cars on July 22, 1920, as they might have found there was discrimination prior to July 22nd. No date is mentioned in instruction 1 as the date July 22nd in

instruction 4 is mentioned. By instruction 4 the jury was told plainly that if the cars were delivered, etc., on July 22nd, then plaintiff could not recover. We do not think that the jury was misled or confused, hence the rule this point against defendant.

Defendant challenges instruction number 1 because it fails to require a finding that the discrimination was *undue or unreasonable,* but if defendant discriminated against plaintiff, as his evidence tended to show then such discrimination was as a matter of law undue and unreasonable, and under the facts here, it was not necessary to submit that issue. The instruction requires a finding of facts which if true shows that plaintiff was subjected to undue or unreasonable prejudice or disadvantage.

Plaintiff's instruction on the measure of damages is as follows: "The court instructs the jury that if you find for the plaintiff, you should, in assessing his damage, take into consideration the reasonable market value of plaintiff's lumber at the date the cars ordered by plaintiff, on the 12th day of June, 1920, should have been delivered by the defendant, allowing defendant a reasonable time in which to make said delivery, and the reasonable market value of the lumber at the time defendant did deliver the cars so ordered, and your verdict should be for the difference between these two amounts not to exceed $1,000." We think that this instruction is proper and is not subject to the criticism leveled against it.

Is the verdict excessive? Plaintiff alleged: "That on June 12, 1920, he had placed ready for shipment at Oxly, Missouri, a station on defendant's railroad 20,000 feet of hardwood lumber, which was at the time of the reasonable market value of $60 per M, and which he had contracted to sell at that price, provided same could be delivered within a reasonable time, and on that date made application for two cars of defendant's agent at the station of Oxly and requested that same be delivered to him at that station for the purpose of transporting his said lumber over defendant's railroad from Oxly, Missouri, to St. Louis, Missouri".

Plaintiff had contracted to sell this lumber to one Arnold at $60 per thousand. Arnold had advanced $600 on the lumber, and because thereof accepted a car loaded on August 23rd. The number of feet in this car was estimated at from 10,000 to 11,625. This left, according to plaintiff's petition, not over 10,000 feet. The evidence showed that the market value on June 12th was $60 per thousand and that there was practically no market in August when plaintiff was furnished cars.

Confining plaintiff to his petition he sustained no loss except on the 10,000 feet left after Arnold's car was accepted. Plaintiff disposed of the remaining 10,000 feet at an average of $9.75 per thousand. Hence on the 10,000 feet remaining he sustained a loss equal to the difference between $9.75 per thousand and $60 per thousand, which loss on the 10,000 feet amounted to $502.50. This conclusion is inevitable if plaintiff is to be bound by his petition, and that he is so bound is the rule. Davis v. Bond, 75 Mo. App. 32; Leavel v. Johnston, 209 Mo. App. 197, 232 S. W. 1064. We have averaged the price for which plaintiff disposed of his lumber locally, because there is no satisfactory evidence that there was any *market*, as that term is generally understood, when plaintiff was furnished cars in August. As stated plaintiff *alleged* that he had 20,000 feet of lumber for shipment on June 12th, when he ordered two cars. He testified that he had on that date between 31,000 and 32,000 feet. It is on this *evidence*, and on the *assumption* that the 31,000 or 32,000 feet could have been shipped in *two* cars that plaintiff attempts to sustain his verdict for $1,000; but plaintiff ignores his petition in arriving at the result.

Based on the petition plaintiff's verdict could not exceed $502.50. The verdict of $1,000 returned by the jury was trebled, and plaintiff had judgment for $3,000. Plaintiff's judgment under his petition cannot exceed $1,507.50. If plaintiff will within 10 days from the date of filing this opinion file here a remititum of $1,492.50, the judgment for $1,507.50 will be affirmed, otherwise the cause will be reversed and remanded. Cox, P. J., and Farrington, J., concur.

JOHN H. BRADLEY, Judge.

MOTION FOR RE-HEARING.

In the Springfield Court of Appeals, March Term, 1923.

Roy Stroud — Respondent,

Vs. No. 3245.

Missouri Pacific Railroad Company, a Corporation, — Appellant.

Appeal from the Circuit Court of Ripley County.

Hon. Almon Ing, Judge.

Appellant's Motion for a Re-hearing.

Comes now the appellant in the above entitled cause,

within ten days from the rendition of the opinion of this court in this cause; and files its motion for a re-hearing herein, and as grounds for said motion states:

That this court has overlooked the following cases cited by appellant in its brief:

I.

Steele v. Railroad, 165 Mo. App. 311.
C., R. I. & P. R. R. Co. vs. Farmers Elevator Co., 226 U. S. 426, 33 Sup. Ct. Rep. 174.
Southern Railway Company, v. Reid, 222 U. S. 424, 32 Sup. Ct. Rep. 140.
Erie R. R. Co. v. People of the State of New York, 233 U. S. 671, 34 Sup. Ct. Rep. 756.
People v. Commission, 135 N. E. 197.

II.

That this court's opinion in refusing to hold that the statutes of Missouri became inoperative on the question of discrimination in favor of intersate shippers after the enactment of a staute on the subject by Congress, is in conflict with the following cases:

Savage v. Jones, 225 U. S. 501, 32 Sup. Ct. Rep. 715.
Southern R. Co. v. Reid, 222 U. S. 424, 32 Sup. Ct. Rep. 140.
Northern Pac. R. Co. v. Washington **ex rel.** Atkinson, 222 U. S. 370, 32 Sup. Ct. Rep. 160.
T. & P. R. Co. v. Abilene Cotton Oil Co., 204 U. S. 426, 27 Sup. Ct. Rep. 350.

III.

The case of Alexander v. C. M. & St. P. Ry. Co., 282 Mo. 236, 221 S. W. 712, cited by this court in its opinion, and upon which the holding in said opinion is based is not in point for the reason that there was no question of interstate commerce in the case whatever.

IV.

On the question of conflict between respondent's instruction number 1 and appellant's instruction number 4, this court has overlooked the case of Murdock v. Dunham, 204 S. W. 915, and cases there cited, which hold that the instructions are conflicting and constitute reversible error.

SUGGESTIONS IN SUPPORT OF MOTION FOR RE-HEARING.

Regarding the quotation from the Alexander case upon which this opinion is based, appellant respectfully suggests that the court's reasoning in that quotation is as equally applicable to the interstate commerce statute enacted by Congress as it is to the Missouri statute relied on herein for recovery. It may be true, as argued by this court, that the carrier is forbidden to subject any particular person to any undue or unreasonable prejudice or disadvantage, and by so doing violates the Missouri statute. If the same act results in giving undue or unreasonable preference to an interstate shipper, the common carrier has violated the act of Congress. Such being the case, has the shipper who has been prejudiced thereby, a remedy under the Missouri statute.

A holding that the shipper may recover under *both* statutes would be as intolerable as holding that "a common carrier may, without just reason, ruin a man's business by refusing to serve him, and then escape liability therefor merely because the injured one cannot prove that the carrier has shown an undue preference toward another."

The question at issue here is whether or not the remedy furnished by the act of Congress is exclusive. Appellant maintains that under the authorities cited, *supra*, and cites also in its original and supplementary brief that Congress has entered this field, and that being true the remedy furnished by Congress is exclusive, and respondent cannot maintain an action under the Missouri statute.

Wherefore, appellant respectfully prays that a rehearing be granted herein.

Respectfully submitted,
EDW. J. WHITE,
JAMES F. GREEN and
J. C. SHEPPARD,
Attorneys for Appellant.

Service of a copy of the above motion for re-hearing is hereby acknowledged this fifth day of July, A. D. 1923, and formal notice of the filing thereof waived.

R. I. COPE,
L. E. TEDRICK,
Attorneys for Respondent.

ORDER OVERRULING MOTION FOR RE-HEARING.

In the Springfield Court of Appeals, March Term, 1923.

Roy Stroud, Respondent,
V. No. 3245.
Missouri Pacific Railroad Company, Appellant.

Be It Remembered, That on the 16th day of July, 1923, the following order was entered of record:

Now, at this day, the court having fully considered the said appellant's motion for a re-hearing of this cause, doth overrule the same.

State of Missouri—Set.

I, Frances P. Daniel, Clerk of The Springfield Court of Appeals, do hereby certify that the foregoing is a true copy of the order of the court, as fully as the same appears on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Springfield Court of Appeals. Done at office in Springfield, State aforesaid July 16, 1923.

(Seal) FRANCES P. DANIEL, Clerk.
HELEN F. BARTLETT, Deputy.

REMITTITUR.

In the Springfield Court of Appeals, March Term, 1923.

Roy Stroud, Respondent,
Vs.
Missouri Pacific Railroad Company,
a Corporation, Appellant.

Now, comes the above named respondent and within ten days after the opinion was handed down in the above case and hereby enters a remittitur of Fourteen Hundred Ninety-two Dollars and Fifty Cents ($1,492.50) in accordance with the opinion of this court.

(Signed) COPE & TEDRICK,
Attorneys for Respondent.

State of Missouri—Set.

I, Frances P. Daniel, Clerk of the Springfield Court of Appeals, do hereby certify the above to be a true and correct copy of the remittitur filed by respondents in the above entitled cause, as fully as same appears on file in my office.

In Witness Whereof, I hereunto set my hand and affix the official seal of this court. Done in the City of Springfield, State aforesaid, this 19th day of September, 1923.

(Seal) FRANCIS P. DANIEL, Clerk.

State of Missouri—Set.

I, Frances P. Daniel, Clerk of the Springfield Court of Appeals, do hereby certify that the foregoing is a true copy of the Abstract of the Record and Brief; opinion filed January 29, 1923; motion for re-hearing filed in consequence thereof; order of the court sustaining that motion; final opinion filed June 26, 1923; record showing filing of remittitur; second motion for re-hearing filed and the order of the court overruling same in the case of Roy Stroud, respondent v. Missouri Pacific Railroad, appellant, No. 3245.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Springfield Court of Appeals. Done at office in Springfield, State aforesaid, July 24, 1923.

(Seal)

(Signed) FRANCES P. DANIEL, Clerk.
(Signed) HELEN F. BARTLETT, Deputy.

Respectfully submitted,
EDW. J. WHITE,
JAMES F. GREEN,
J. C. SHEPPARD,
Attorneys for Petitioner.

Office Supreme Court, U. S.
FILED
JUL 24 1926
WM. R. STANSBURY
CLERK

IN THE

Supreme Court of the United States

MISSOURI PACIFIC RAILROAD COMPANY,
PETITIONER,
VS.
ROY STROUD,
RESPONDENT.

No. 168

BRIEF OF PETITIONER.

EDW. J. WHITE,
JAS. F. GREEN,
J. C. SHEPPARD,
Attorneys for Petitioner.

HUNTSINGER & GOE, PRINTERS, POPLAR BLUFF, MISSOURI.

8,9,12,14

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IN THE

Supreme Court of the United States

MISSOURI PACIFIC RAILROAD COMPANY,
PETITIONER,
VS.
ROY STROUD,
RESPONDENT.
No. 547.

BRIEF OF PETITIONER.

STATEMENT.

This is a suit originally instituted in the Circuit Court of Ripley County, in the State of Missouri, by respondent herein for damages alleged

to have resulted from the unlawful discrimination by the petitioner in favor of other shippers and against respondent. The suit is based upon Sections 9985 and 9990. The former section prohibiting the discrimination, and the latter fixing the penalty therefor. The petition further alleges that on the 12th day of June, 1920, respondent ordered two cars from the agent of petitioner to be placed for him for the purpose of loading and shipping lumber at the station on petitioner's line known as Oxly, Missouri; that petitioner furnished cars to other shippers of lumber from said point on orders made after the 12th day of June, 1920, and said cars were furnished prior to the time that cars were furnished respondent in compliance with its order of June 12, 1920, thereby giving preference to other shippers over respondent, and asked for the penalty as provided by section 9990 of the State Statutes of three times the amount of damages sustained by respondent by reason of the alleged discrimination. The answer denies the discrimination as pleaded in the petition, and sets up the further fact that all cars, if any, which were furnished other shippers in preference to the cars furnished respondent, were furnished to interstate shippers and under orders of the Interstate Commerce Commission, giving the preference to said interstate shippers.

The facts in the case, so far as are material to this application, are as follows: Stroud on June 12, 1920, ordered two cars from the agent of your

petitioner at Oxly, Missouri, to be there delivered to him for the shipment of a quantity of lumber to the City of St. Louis, Missouri. It was claimed on the trial of the cause, and there was some evidence to that effect, that after the order for the two cars above mentioned was made by Stroud, other shippers ordered cars for the shipment of lumber from the same point to points outside of the State of Missouri; and that said last mentioned orders for cars were filled before the delivery by petitioner of the two cars to Stroud, resulting in discrimination, it is claimed, in favor of interstate shippers and against Stroud, an intrastate shipper. The evidence further showed that had the cars ordered by Stroud been shipped from Oxly to St. Louis, Missouri, they would have been routed through the State of Illinois, thereby making them interstate shipments.

At the close of the trial the court gave to the jury the following instruction:

> "The court instructs the jury that if you believe and find from the evidence in this case, that the plaintiff, Roy Stroud, had, on the 12th day of June, 1920, a quantity of lumber placed at Oxly, Missouri, a station on defendant's railroad; that said lumber was deposited at the place provided by defendant for receiving such shipments; and that plaintiff on said date made application to defendant's agent at the said station for cars in which to ship his lumber; and that he tendered said lumber for shipment under the terms and conditions

imposed by defendant; and if you further find that after the said cars were ordered by plaintiff and his application for same was filed and before said cars were delivered other shippers at the said station of Oxly, Missouri, engaged in the business of shipping lumber over defendant's railroad, ordered cars from defendant's agent at the station aforesaid, and that the defendant delivered cars to these shippers in preference to plaintiff, and that the cars delivered to these other shippers were not to be used for shipping mine props or other mine material that had a preference under the Interstate Commerce Commission's ruling, offered in evidence; and if you further find that such preference, if any, resulted in a loss to plaintiff, then your verdict must be for plaintiff for such sum as you believe from the evidence he has been damaged, not to exceed $1,000.00."

This instruction tells the jury that if other shippers ordered cars subsequent to the time respondent ordered cars, that these shippers were furnished cars prior to the time respondent's cars were furnished, that unless these cars furnished other shippers were to be used for shipping mine props or other mine material, which had a preference under the ruling of the Interstate Commerce Commission, they should find for the plaintiff. This leaves out of consideration entirely the question whether or not cars furnished other shippers or Stroud were to be used in interstate commerce. It is petitioner's contention that if any of such cars were so used, then respondent has no cause of

action under the Missouri Statute, and his cause of action, if any he has, was under the Act to regulate Commerce, which provided in Section one thereof, that the Interstate Commerce Commission shall have jurisdiction over the question of the supply and distribution of cars; and Section three as amended February 28, 1920, provides:

> "That it shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

Assignment of Errors.

I.

The court erred in giving to the jury the instruction set out in this brief at pages 3 and 4.

II.

The court erred in failing to limit the jury by said instruction to cars to be used in Intrastate Commerce.

III.

The court erred in allowing the respondent to recover the penalty provided by the State Statute.

Brief

Section 9985 of the Missouri Statutes of 1919, reads as follows:

> "Discrimination between person or localities prohibited.—It shall be unlawful for any such common carrier to make or give any undue or unreasonable preference or advantage to any particular person, company or firm, corporation or locality, in the transportation of goods, wares and merchandise of any character, or to subject any particular person, firm, corporation or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage with respect to such transportation; and all such common carriers shall afford equal facilities for the interchange of traffic between their respective lines, and for receiving, forwarding and switching cars and delivering property to and from their lines, and to and from other lines and places connected therewith, and shall not discriminate in their accommodation, rates or charges between such connecting lines and places. But this provision shall not be construed as requiring such common carriers to give the use of their tracks or terminal facilities to other common carriers engaged in a similar business."

Section 9990 of the Missouri Statute of 1919, reads as follows:

"Penalty—triple damages for violation of this law.—In case any such common carrier shall do or cause to be done any act or things in Sections 9980 to 9994, inclusive, prohibited or declared to be unlawful, or shall omit to do any act or thing in said sections required to be done, then such common carrier shall be liable to the person or persons injured thereby for three times the amount of damages sustained in consequence of the violation of the provisions of said sections, together with a reasonable attorney's fee, to be fixed by the court, which fee shall be taxed and collected as part of the costs in the case."

Section 1 of the Hepburn Act, without quoting the whole section, provides:

"Shall include cars and other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevaton and transfer in transit, ventilation, refrigeration or icing, storage and handling of property transported; and it shall be the duty of every carrier subject to the provisions of this act to provide and furnish such transportation upon reasonable request therefor, and to establish through routes and just and reasonable rates applicable thereto."

And further on the section has this provision:

"And shall furnish cars for the movement of such traffic to the best of its ability without

discrimination in favor of or against any such shipper."

Section 8 of said Act providing the penalty, is is follows:

> "Liability to persons injured by violation of act.—That in case any common carrier subject to the provisions of this act shall do, cause to be done, or permit to be done any act, matter, or thing in this act prohibited or declared to be unlawful, or shall omit to do any act, matter or thing in this act required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this act, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case (24 Stat. L. 382)."

The cars ordered by Stroud were for an interstate shipment, and some of the cars which the proof shows were furnished on orders made subsequent to the order of Stroud, before Stroud's order was filled, were interstate shipments. The Federal Statute controlled and not the State Statute.

It would seem that Congress undertook to legislate concerning the furnishing of cars for interstate shipment, and if so the Federal Statute takes precedence over any State Statute on the subject of interstate commerce.

Adams Express Co. vs. Croninger, 226 U. S., 491.

Southern R. R. Co. vs. Reid, 222 U. S., 424.

Northern Pacific Railway Co. vs. Washington *ex rel,* Atkinson, 222 U. S., 370.

Erie R. R. Co. vs. People of State of N. Y., 233 U. S., 671.

Charleston West Carolina Railway Co. vs. Varnville Furniture Co., 237 U. S., 597.

C., R. I. & P. Railroad Co. vs. Farmers Elevator Co., 226 U. S., 426.

Argument

This suit is based on the State Statute of the State of Missouri, and seeks to recover a penalty for three times the amount of damages sustained by reason of the railroad failing to furnish the respondent cars in which to load his lumber, and claiming that the railroad company discriminated against him, or rather gave a preference to other shippers, and furnished to them cars before those furnished to respondent, although ordered after respondent ordered his cars. The State Statute provides a penalty for unreasonable and unlawful discriminations. It would seem from the statute above quoted that Congress has also legislated on this subject in so far as it affects interstate shipments, and has also provided a penalty for unlawful discrimination in the supplying of cars for that class of shipment. The evidence in the case (see Ab. of record copy of order book between pages 18 and 19) shows that some of the cars ordered after respondent ordered his two cars, which was June 12, 1920, were furnished to the other shippers before respondent received his cars, and that the said cars furnished other shippers were for interstate shipment, and therefore it is our contention that the Federal law governed, and no suit could be maintained upon the State Statute, and for a penalty provided

by State Statute, but any suit for this class of discrimination would be governed by the Federal Statute and the penalty therein provided, and this we contend is true, although the cars which respondent ordered were not intended for an interstate shipment. The testimony of Mr. Brice, Superintendent of Transportation of the Missouri Pacific Railroad (see Ab. of record, pages 34-39) shows that the cars ordered on June 12, 1920, by respondent for the purpose of shipping lumber from Oxly, Missouri, to St. Louis, Missouri, would have gone through the State of Illinois, and therefore would have been an interstate shipment. It would seem that this court has practically put the question at rest by its opinion in the case of C. R. I. & P. R. R. Co. vs. Farmers Elevator Co., *ib.* where Chief Justice White said:

> "In the original act (24 Stat. at L. 379, Chap. 104, U. S. Comp. Stat. Supp., 1911, p. 1284) to regulate commerce the term 'transportation' was declared to embrace all instrumentalities of shipment or carriage. By the Hepburn act it was declared that the term 'transportation' shall include cars and other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof and all services in connection with the receipt, delivery, elevation and transfer in transit, ventilation, refrigeration or icing, storage and handling of property transported; and it shall be the duty of every carrier subject to the provisions of this act to

provide and furnish such transportation upon reasonable request therefor, and to establish through routes and just and reasonable rates applicable thereto.

"The purpose of Congress to specifically impose a duty upon a carrier in respect to the furnishing of cars for interstate traffic is, of course, by these provisions clearly declared. That Congress was specially concerning itself with that subject is further shown by a proviso inserted to supplement Section 1 of the original act, imposing the duty under certain circumstances to furnish switch connections for interstate traffic, whereby it is specifically declared that the common carrier making such connections 'shall furnish cars for the movement of such traffic to the best of its ability, without discrimination in favor of or against any such shipper.' Not only is there then a specific duty imposed to furnish cars for interstate traffic upon reasonable request therefor, but other applicable sections of the act to regulate commerce give remedies for the violation of that duty. Thus, by Section 8 it is provided 'that in case any common carrier subject to the provisions of this act———shall omit to do any act, matter or thing in this act required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this act, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs of the case'. Further, by Section 9 an election is given to either make complaint to the Interstate Commerce Commission or to bring, in a designated court, an

action for the recovery of damages; and by Section 10 it is made a criminal offense for an employee of a corporation carrier to 'wilfully omit or fail to do any act, matter or thing in this act required to be done'.

"As legislation concerning the delivery of cars for the carriage of interstate traffic was clearly a matter of interstate commerce regulation, even if such subject was embraced within that class of powers concerning which the State had a right to exert its authority in the absence of legislation by Congress, it must follow, in consequence of the action of Congress to which we have referred, that the power of the State over the subject matter ceased to exist from the moment that Congress exerted its paramount and all embracing authority over the subject. We say this because the elementary and long settled doctrine is that there can be no divided authority over interstate commerce, and that the regulations of Congress on that subject are supreme It results, therefore, that in a case where, from the particular nature of certain subjects, the State may exert authority until Congress acts, under the assumption that Congress, by inaction, has tacitly authorized it to do so, action by Congress destroys the possibility of such assumption, since such action, when exerted, covers the whole field, and renders the State impotent to deal with a subject over which it had no inherent, but only permissive power. Southern R. Co. v. Reid, 222 U. S., 424, 56 L. Ed., 257, 32 Sup. Ct. Rep., 140."

It will be noticed that instruction No. 1 given on behalf of respondent by the trial court (see Ab. of record, p. 46) permits the jury to find for the

respondent, regardless of whether or not any of the cars ordered were to be used in interstate commerce, and this is the one point in this case which gives jurisdiction to this court. The burden of showing that the cars furnished other shippers before they were furnished to respondent, which said cars had been ordered after respondent filed his order for cars, had not been used for interstate commerce rested upon the respondent. Whether this be technically true or not the evidence shows conclusively that those cars were used in interstate commerce, and the instruction failed to require the jury to find this fact either one way or the other.

The argument is made in the opinion of the Springfield Court of Appeals that to give one shipper undue or unreasonable preference or advantage is bound to result in undue or unreasonable prejudice or disadvantage to some other shippers, because there could be no advantage if only one shipper were involved, and reaches the conclusion that to charge undue or unreasonable preference or advantage is equivalent to a charge of undue or unreasonable prejudice or disadvantage. The court reaches the further conclusion that the common carrier may not, without just reason, ruin a man's business by refusing to serve him and then escape liability therefor merely, because the injured one cannot prove the carrier has shown undue preference towards another, and therefore the party injured would have no remedy. This argument leaves out of view entirely the remedy pro-

vided by Congress which governs interstate shipments. It will be observed that the act of Congress provides a penalty against the carrier who shall fail to "furnish cars for the movement of such traffic to the best of its ability without discrimination in favor of or against any such shipper". The Federal Statute and the State Statute in so far as they prohibit the discrimination in the furnishing of cars to shippers cover the same field, or rather cover the same acts, by prohibiting the discrimination in favor of or against any shippers. The question then narrows itself down to whether or not the cars ordered were for interstate commerce. It certainly could not be contended that the carrier violated both statutes as this would be intolerable. It is our contention, therefore, that Congress entered this field in so far as interstate shipments are concerned, and that having done so it took exclusive control of the subject, and the remedy if any is under the Federal Act exclusively. We submit that the opinion of the Springfield Court of Appeals should be reversed, and as the evidence shows without dispute that the cars were to be used in interstate commerce the case should be reversed without remanding.

Respectfully submitted,
EDW. J. WHITE,
JAS. F. GREEN,
J. C. SHEPPARD,
Attorneys for Petitioner.

IN THE

Springfield Court of Appeals

OCTOBER TERM, 1922.

(POPLAR BLUFF CALL.)

ROY STROUD,

RESPONDENT,

VS.

MISSOURI PACIFIC RAILROAD COMPANY, A CORPORATION,

APPELLANT.

NO. 3245.

RESPONDENT'S STATEMENT, BRIEF AND ARGUMENT.

STATEMENT.

This cause of action originated in the Circuit Court of Ripley County, Missouri, and is brought under Section 9985 of the Revised Statutes of Missouri of 1919. The petition of the plaintiff alleges in substance, that respondent had on the 12th day of June, 1920, a quantity of lumber, to-wit, 20,000 feet, placed at Oxly, Missouri, a station on appellant's railroad, which he tendered for shipment, and

on that date made application for two cars in which to ship said lumber. The petition further alleges that after respondent had made application for the cars aforesaid, other shippers, shipping lumber from the same station, made application for cars, and these subsequent orders were filled before that of respondent.

The petition further alleges that by reason of the preference shown other shippers, respondent did not receive any cars until the 19th of August, 1920, and that by reason of such preference respondent was damaged in the sum of $1,000.00, occasioned by a considerable decline in the lumber market between the dates of June 12th, and August 19th, 1920.

The answer of appellant admits its corporate existence, and admits that respondent had a quantity of lumber placed for shipment at Oxly, Missouri, but denies that there was 20,000 feet of same, and denies that plaintiff tendered the lumber for shipment under the terms and conditions imposed by appellant, and further denies that plaintiff offered to pay defendant the customary charges for the transportation thereof.

The answer further alleges that the order for the two cars made June 12, 1920, by respondent, was filled by placing said cars ready for loading, but that respondent refused to load the cars for a period of four days, and then voluntarily permitted one A. M. Rash to load said cars and ship same. The answer denies any discrimination whatsoever.

For a further defense, appellant states in its answer that it operates two lines of railroad from Oxly, Missouri, to St. Louis, Missouri, one of which is wholly within Missouri, and the other crossing the Mississippi River at Thebes, Illinois, and going

up to St. Louis on the Illinois side of the river. Appellant further states in its answer that the usual way of routing lumber from Oxly, Missouri, to St. Louis, Missouri, would be via Thebes, Illinois, making the shipment an interstate shipment, and that Section 9985 of the Revised Statutes of Missouri of 1919 does not apply.

The evidence in the case on the part of the respondent tended to show that he placed at Oxly, Missouri, on June 12, 1920, 31,000 feet of lumber, that said lumber was stacked along the Missouri Pacific tracks at the place designated by the Railroad Company. Respondent testified that he was selling this lumber for $60.00 per M, and had a contract with A. L. Arnold, of Naylor, Missouri, whereby he was to receive that sum for all the lumber he had so placed as soon as same could be loaded on the cars. Respondent testified that he ordered two cars on the 12th day of June, 1920, but that he did not receive them until August 19th, 1920, and when he asked for an explanation as to the delay in delivery he was shown a telegram, by the agent at Oxly, purporting to be from C. H. Dicus, Assistant Chief Dispatcher of the Missouri Pacific at Poplar Bluff, Missouri, which said telegram contained in substance, "Let Rash have cars in preference to any one else."

The testimony showed that between the dates of June 12th and August 19th, there was a drop in the market, and after August 19th, there was no demand whatever for lumber, and respondent could not sell what he had left on the market at any price, but did sell to the farmers around Oxly for from $12.50 to $20.00 per M. Respondent was unable to say exactly how much of this lumber was sold to the

farmers, but the testimony did show that about 11,000 feet out of the 31,000 feet was sold to Arnold, leaving 20,000 feet which he was unable to ship. The testimony as to the market value of lumber on June 12th, 1920, showed that it was worth $60.00 per M, as against $20.00 to $25.00 in August, 1920.

There was ample testimony on the part of the respondent tending to show that between the dates of June 12th, and August 19th, 1920, the Rash Lumber Company was loading and shipping lumber from Oxly, Missouri, at the rate of ten to fifteen cars per week.

The order book opposite page 17 in the abstract of the record discloses that respondent ordered two cars June 12, 1920, and one July 6, 1920; that the first cars he received was on August 19th, 1920. The order book also discloses that A. M. Rash ordered five cars July 13, 1920, and that the orders were filled as follows: Three, July 22; one, July 28, and one, August 3. The record further shows that Rash made an order for ten cars July 17, 1920, and eight of these were delivered prior to August 19th, the date respondent received his, and that there were other shippers whose orders were filled before that of respondent, although their applications were made after respondent's.

The testimony of the appellant shows that respondent ordered two cars June 12, 1920, and were delivered to respondent the 22nd day of July, 1920, who, unable to get loaders, agreed that Rash might load these cars, which he did. This is denied by respondent, who is corroborated by the record in the order book, opposite page 17, abstract of record, which not only fails to disclose that any cars were

delivered to respondent on that date, but shows that they were delivered to Rash.

The evidence further shows that there was an order of the Interstate Commerce Commission requiring cars to go to the coal mining districts, and a preference was given to shipments of mining props, but upon cross examination it was shown that the bulk of the Rash Company's shipments were lumber and ties.

POINTS AND AUTHORITIES.

I.

Appellant's instruction in the nature of a demurrer offered at the close of all testimony was properly overruled. There was sufficient evidence on this part of the plaintiff to show unlawful and unreasonable discrimination.

Appellant's Abstract, pages 9-10-11-12 and opposite page 17.

Nichols v. Oregon Short Line Ry. Co., 66 Pac. 768.

II.

(a). The court did not err in giving to the jury plaintiff's instruction, No. 1. It is not necessary to require the jury to find that the cars furnished the other shippers were to be used for intrastate shipments, as defendant was guilty of unlawful discrimination, regardless of how these other cars were to be used. All the respondent is concerned with is to establish the fact that his shipment was intrastate.

Puritan Coal Mining Co. v. Penn. R. R. Co., 85 Atlantic Rep. 426.

Stroud v. Missouri Pacific Ry. Co., 236 S. W. 891.

Missouri Pacific Ry. Co. v. Larabee Mills, 211 U. S. 612 Loc. Cit., 624.

(b). Appellant complains that respondent's instruction No. 1, is in conflict with appellant's No. 4, and "that it permitted the jury to find for respondent even though they believed that he was furnished cars on July 22, 1920." Instruction No. 1,

requires the jury to find "that after the said cars were ordered by plaintiff, and his application for same was filed and before said cars were delivered other shippers at the said station of Oxly, Mo., engaged in the business of shipping lumber over defendants' railroad, ordered cars from defendants' agent at the station aforesaid, and that defendant delivered cars to these shippers in preference to plaintiff and that these cars delivered to these other shippers were not to be used for shipping mine props or other mine material that had a preference under the Interstate Commerce Rulings * * *".

This instruction, we think, covers the case fully and requires the jury to find there was a preference, and it makes no difference if plaintiff had received a dozen cars, provided he showed that the railroad company discriminated against him and he sustained damages thereby.

Stroud v. Missouri Pacific R. R. Co., 236 S. W., 891 Loc. Cit. 894.

Section 9985 R. S. 1919.

(c). Instruction No. 1, does require the jury to find there was undue and unlawful preference. It sets out a state of facts, which, under the law, constitutes undue and unreasonable preference and this being true, it is unnecessary to use the terms, "undue" and "unreasonable".

Appellant's Abstract, page 63.

III.

The court did not err in giving plaintiff's instruction on the measure of damages. This instruction required the jury to "take into consideration the reasonable market value of plaintiff's lumber at the date the cars ordered by plaintiff, on the 12th

day of June, 1920, should have been delivered by the defendant, allowing defendant a reasonable time in which to make the delivery, and the reasonable market value of the lumber at the time defendant did deliver the cars." * * *

There could not have been any inference drawn from this instruction, by the jury, that would be prejudicial to defendant as it limited the amount of damages to the loss sustained on the lumber that was still at Oxly, Missouri, on August 19, 1920.

IV.

The court did not err in refusing appellant a new trial because the verdict is supported by the evidence. Appellant loses sight of the fact that the lumber, loaded and shipped on August 19th, was car material and was not included in this controversy, and the car in which it was shipped was ordered July 12, 1920. The other car referred to by appellant and shipped on the 23rd of August, 1920, and for which respondent received $60.00 per thousand, was the car upon which Arnold had advanced $600 and which he was compelled to take, and which was taken out of the original amount. This car contained about 11,000 feet which left 20,000 or 21,000 feet, upon which the loss was sustained.

Appellant's Abstract, page 17.

ARGUMENT.

The testimony in this case shows that respondent, the Rash Lumber Company, and others, were engaged in shipping lumber to various points, both within and without the state of Missouri, and were shipping over appellant's railroad. On June 12, 1920, respondent made application for two cars in which to ship a quantity of his lumber, which he had placed and ready for shipment, and these cars were not delivered until August 19, 1920. Between these dates, several other shippers ordered cars and their cars were delivered by appellant before those ordered by respondent were delivered. Appellant's own record shows that Park Brothers ordered cars, June 28, 1920, for the purpose of shipping chair posts and that this car was delivered August 15, 1920. The Rash Lumber Company ordered five cars for lumber and ties, July 13, 1920, and they were delivered to them on July 22-28, and August 3, 1920. There were several other orders that were filed after that of respondent and which were filled before he received the cars ordered by him. This clearly shows unlawful discrimination against plaintiff. (Nichols v. Oregon Short-Line R. R. 66 Pac. 768.)

Appellant attempted to prove that the cars ordered by respondent, June 12, 1920, were delivered to him, July 22, 1920, and that through some arrangement between this respondent and the Rash Lumber Company, the cars were turned over to the Rash Lumber Company, however, appellant's own record refutes any such argument, for it discloses that these cars were not delivered to the respondent until August 19, 1920, and respondent testi-

fied to the same state of facts. As this question was one of fact, and was passed upon by the jury, we believe that the court will be justified in accepting the jury's finding as conclusive.

Appellant contends that the verdict of the jury was not supported by the evidence because he says, "the loss could not have been more than $400, under the most favorable circumstances" but in arriving at this conclusion, appellant is taking into consideration, a carload of car material, which was shipped on August 19, 1920. This car material never was included in the subject matter of this lawsuit. There was approximately 31,000 feet of inch lumber stacked at Oxly, and none of it was shipped until August 23, and then only 11,000 feet. This was a carload that Arnold had purchased and advanced the money on and it was never included in the 20,000 feet upon which plaintiff's loss was sustained.

The evidence shows that plaintiff's lumber was worth $60.00 per thousand, at the time the cars were ordered, and when the cars were delivered, there was no sale at all, although plaintiff sold the lumber to local people at various prices, ranging from $8.00 to $20.00 per thousand. Plaintiff testified that he sold 1,000 feet at $20.00 per thousand, 2,000 feet at $12.50 per thousand, 7,000 feet at $10.00 per thousand, 6,000 feet for $8,00 and the remaining 4,000 feet, which he testified was worth $8.00 per thousand, was taken home and used. The total amount received was $195.00, which if subtracted from $1,200 the value on the 12th of June, 1920, leaves $1,005.

Upon the former trial of this case, appellant took the position that since there were two lines of railroad, from Oxly, Missouri, to St. Louis, Missouri, one running through Illinois, and over which plain-

tiff's lumber might have been shipped, had he received the cars he ordered, that the trial court had no jurisdiction of the case, however, this court refused to entertain the proposition, and now appellant takes the position that if some of the other shippers were shipping over a line of railroad running through Illinois or some other State, that this fact would preclude plaintiff from recovering in the State Court. It seems to us that one of these contentions is just about as logical as the other, and we have no doubt that this last position, with reference to interstate shipments, will meet the same fate as did the former.

We believe, that the facts in this case are in the plaintiff's favor and two juries that have passed on them evidently believed the same thing. We also believe that the law, as given in behalf of respondent, was proper and that the case was fairly tried, and we earnestly believe that the judgment of the trial court should be affirmed.

Respectfully submitted,
COPE and TEDRICK, of Poplar Bluff, Mo., and GEO. H. MOORE, of St. Louis, Mo.,
Attorneys for Respondent.

In The

Springfield Court of Appeals

MARCH TERM, 1923.

POPLAR BLUFF CALL.

ROY STROUD, ... **Respondent**

vs.

MISSOURI PACIFIC RAILROAD COMPANY, a Corporation ..... **Appellant.**

Respondent's Brief and Argument

On Appellant's Motion for Rehearing.

COPE & TEDRICK,
Attorneys for Respondent.

POINTS AND AUTHORITIES.

I.

Respondent's instruction No. 1 was properly given. It is not necessary to require the jury to find "that the cars furnished the other shippers were not to be used in interstate commerce." All that respondent is concerned with is in establishing the fact that his shipment or rather intended shipment was intrastate.

Puritant Coal Mining Co. v. Penn. R. R. Co., 237 Pa. St. 420. Affirmed in 237 U. S. 121.

Missouri Pacific Ry. Co. v. Larabee Mills, 211 U. S. 612.

Public Utilities Commission ex rel Hillsboro

Coal Co. v. Cleveland C. C. & St. L. Ry. Co., 301 Ill. 219.

Mulberry Hill Coal Co. v. Illinois Central R. R. Co., 257 Ill. 80. Affirmed in 238 U. S. 275.

Chicago Milwaukee & St. Paul Ry. Co. v. State Public Utilities Company of Illinois, 268 Ill. 49. Affirmed in 242 U. S. 333.

Pennsylvania R. R. v. Sonman Coal Co., 241 Pa. St. 487. Affirmed in 242 U. S. 120.

State of Texas v. East Texas Ry. Co. Advance opinion. Lawyer's Co-operative Pub. Co. of April 15th, 1922, page 313.

II.

The verdict is not excessive and is amply supported by the evidence. Appellants abstract of the record pages 9, 10, 11, 12 and opposite page 17.

ARGUMENT.

The first question raised by appellant on its motion for a rehearing, is "if an interstate shipper is favored over an intrastate shipper, has the latter any remedy under the state statute?"

In view of the authorities cited by respondent, we contend that he has. In the absence of legislation by Congress against discrimination between interstate shippers, the state had the right to legislate against discrimination against both interstate and intrastate shippers. Congress having legislated against discrimination between interstate shippers, appellant contends that it has taken over the whole subject matter of discrimination between both interstate and intrastate shippers, which contention well illustrates the tendency of the railroads of the country to attempt to centralize all the power in the Federal Government.

The Interstate Commerce Act does in its terms, provide a remedy for an interstate shipper where he has been discriminated against but it has no provisions giving an intrastate shipper such a remedy where he has been discriminated against, in favor of, either an intrastate or interstate shipper and in view of that fact, we contend that the state is left free to legislate on that subject.

In Mulberry Hill Coal Co. v. Illinois Central R. R. Co., 257 Ill. loc. cit. 82, the Court, in defining the powers of Congress over Interstate Commerce said, "Congress has exclusive jurisdiction over inter-state commerce but we do not understand that a railroad corporation created by a state may, by engaging in interstate commerce emancipate itself from all control by the state and that thereafter the state grant-

ing the franchise and endowing the corporation with all its powers will have no authority to require the performance of the undoubted duty of carrying property offered for transportation where the requirement does not impose any burden upon interstate commerce, or disable the corporation in any way from carrying on such commerce."

It seems to us that this court has ample ground to maintain its opinion as heretofore delivered in this case, and we do not believe that our State Courts will supinely surrender the rights of the state, under the circumstances disclosed herein until there has been an authority holding to the contrary by the highest Federal Court, and we respectfully submit that none has been cited by appellant.

Appellant contends that the verdict was excessive and that respondent was entitled to only $400.00 damages, if any at all but as we review the testimony of the plaintiff we are convinced that there is ample testimony to sustain the verdict. Respondent testified that he had between 31,000 and 32,000 feet of one and two inch lumber which he had contracted to sell at $60 per thousand. In fact he had already received $600 on this lumber, which advancement accounts for the fact that the buyer, Add L. Arnold, of Naylor, Mo., took one car, although at a loss. After this car was sold to Arnold, on the 23rd of August, 1920, there remained 20,000 feet which respondent sold at prices ranging from $8 to $20 per thousand. The two cars described in plaintiff's petition were delivered on Aug. 19, 1920, and, of course these cars could have been loaded with the lumber, but appellant loses sight of the fact that there was no market for that class of lumber on that date and instead of complaining that respondent

sold one carload of the lumber at $60.00 per thousand appellant should feel grateful that it was not called upon to pay the damages on that car.

The fact remains that if the two cars ordered June 12, 1920, had been delivered within a reasonable time this 20,000 feet of lumber could have been disposed of at $60.00 per thousand instead of the prices heretofore mentioned and instead of losing $1005.00 respondent would have sustained no loss at all. (See Appellant's Abstract of the Record pages 9-10-11-12 and Respondent's Brief pages 12-13.)

There is some testimony concerning shipments of car material but as respondent is not asking for damages sustained on these shipments, they should not be considered. (See Appellant's Abstract of the Record pages 16-17.)

We respectfully insist that there is sufficient evidence to support the verdict and confidently expect this Court to maintain its opinion as heretofore rendered.

Respectfully submitted,

COPE & TEDRICK, of Poplar Bluff, M.,
and GEO. H. MOORE of St. Louis, Mo.,
Attorneys for Respondent.

MISSOURI PACIFIC RAILROAD COMPANY *v.* STROUD.

CERTIORARI TO THE SPRINGFIELD COURT OF APPEALS OF THE STATE OF MISSOURI.

No. 168. Argued January 14, 1925.—Decided March 2, 1925.

Where a carrier has two routes by which freight may move between two points within a State, one route wholly within the State and the other partly through another, a prospective shipment which, following the carrier's practice and in the absence of preference

expressed by the shipper, would move over the latter route, is to be governed by the Interstate Commerce Act, in respect of the carrier's duty to avoid discrimination in furnishing cars, and a State regulation in that regard is therefore inapplicable. P. 407.
212 Mo. App. 512, reversed.

CERTIORARI to a judgment of the Court of Appeals of Missouri affirming, with a reduction, a judgment for treble damages recovered by Stroud from the Railroad Company, under Rev. Stats. Mo. §§ 9985, 9990, for discrimination in furnishing freight cars.

Mr. Thomas T. Railey for petitioner. *Messrs. Edw. J. White, Jas. F. Green,* and *J. C. Sheppard,* were on the brief.

Mr. George H. Moore, for respondent, submitted.

MR. JUSTICE BUTLER delivered the opinion of the Court.

This action was brought by the respondent against the petitioner in the Circuit Court of Ripley County, Missouri, to recover treble damages under §§ 9985, 9990, Revised Statutes of Missouri, 1919. The petitioner is a common carrier of freight and passengers for hire by railroad in Missouri and other States. Section 9985 contains the following: "It shall be unlawful for any such common carrier to make or give any undue or unreasonable preference or advantage to any particular person . . . in the transportation of goods . . . or to subject any particular person . . . to any undue or unreasonable prejudice or disadvantage with respect to such transportation . . ." Section 9990, among other things, makes the carrier liable to any person injured by a violation of the above quoted provision for three times the amount of damages sustained.

June 12, 1920, respondent, who was engaged in the lumber business, had 20,000 feet of hardwood lumber

ready for shipment at Oxly, Missouri, a station on petitioner's railroad, and applied for two cars on which to ship the lumber to Saint Louis, Missouri. The petitioner failed to furnish him any cars until August 19, 1920. After he had ordered the cars, and before they were delivered, other shippers at Oxly applied to the petitioner for, and were furnished, cars for the transportation of lumber. Respondent alleged that by § 9985 petitioner was prohibited from so discriminating against him, and that as a result of such unlawful discrimination he was damaged in the sum of $1,000. The complaint alleged the foregoing facts, but contained no allegation that respondent attempted to designate any route, intrastate or interstate, for the transportation of his lumber. The answer denied the discrimination and alleged that petitioner moves its cars from Oxly to Saint Louis over two routes: one wholly within the State of Missouri; the other by way of Thebes, crossing the Mississippi River at that point and running through the State of Illinois into Saint Louis; that the usual and regular way of routing cars loaded with lumber at Oxly and consigned to Saint Louis would be over the latter route through the State of Illinois and would be interstate commerce, and that § 9985 has no application to the facts stated in respondent's complaint.

The first trial resulted in a judgment for respondent which was reversed on appeal. 210 Mo. App. 311. However, the Court of Appeals held that, under these sections, an action lies for damages for discrimination in furnishing cars for the shipment of lumber which could have gone over either an intrastate or interstate route. At the second trial, petitioner's superintendent of transportation testified that, under the routing circular then in force, respondent's lumber would have been hauled over the interstate route; that the line on the Missouri side of the river passes over Iron Mountain and other Ozark

hills, and that the routing through Illinois over the more level line is made as a matter of operating convenience and economy. There was no other evidence on the point. Cf. 210 Mo. App. 316. Respondent did not attempt to designate any route, intrastate or interstate, and there is nothing to show that he expressed or had any preference in respect of the route. At the close of all the evidence in the case, the petitioner requested the court to instruct the jury to return a verdict for petitioner. The court refused to do so, and, notwithstanding the fact that respondent's lumber would have moved over the interstate route, submitted the case to the jury. There was a verdict of $1,000 for respondent, and judgment was entered for three times that amount. Petitioner appealed. 212 Mo. App. 512. The Court of Appeals held that respondent was not entitled to a verdict in excess of $502.50, and ordered that, if respondent filed remittitur, judgment for $1,507.50 would be affirmed. The remittitur was filed and judgment entered accordingly. The case is here on certiorari. § 237, Judicial Code.

Congress, in the exertion of its power over commerce among the States, has enacted laws for the regulation of the furnishing of cars to shippers. Interstate Commerce Act, § 1, (3), (4), (6), (10), (11), (12), (14); § 3 (1); §15 (1). See *United States* v. *New River Company,* 265 U. S. 533, 541. Section 3, c. 104, 24 Stat. 380 (as amended February 28, 1920, § 405, c. 91, 41 Stat. 479) is very similar to § 9985, and contains the following: "That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or for any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or dis-

advantage in any respect whatsoever." It is elementary and well settled that there can be no divided authority over interstate commerce, and that the acts of Congress on that subject are supreme and exclusive. Transportation from Oxly to Saint Louis over the route partly within and partly outside of Missouri is interstate commerce. *Hanley* v. *Kansas City Southern Ry. Co.*, 187 U. S. 617, 620; *Western Union Telegraph Co.* v. *Speight*, 254 U. S. 17. It was shown that the shipment would have moved by that route. The record discloses no facts which would impose upon petitioner any obligation to haul respondent's lumber over the intrastate route. See *Northern Pacific Ry Co.* v. *Solum*, 247 U. S. 477, 482. The state law has no application to the furnishing of cars to shippers for the transportation of freight in interstate commerce. *Chicago, Rock Island & Pacific Ry.* v. *Hardwick Elevator Co.*, 226 U. S. 426, 435; *Southern Ry. Co.* v. *Reid*, 222 U. S. 424, 435; *Steel* v. *Railroad*, 165 Mo. App. 311, 317.

Judgment reversed.